Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC CO. AND PG&E CORP.,
Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1123(a)(5) of the Bankruptcy Code, 11 U.S.C. 1123(a)(5), provides: "Notwithstanding *any* otherwise applicable nonbankruptcy law, a plan [of reorganization] shall * * * provide adequate means for the plan's implementation * * *." The Ninth Circuit held in this case that Section 1123(a)(5) preempts only laws "relating to [the debtor's] financial condition."

The question presented is whether the preemptive effect on state and local laws of Section 1123(a)(5) of the Bankruptcy Code is limited to laws relating to the debtor's financial condition.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties were appellants in the court of appeals and are respondents here: the City and County of San Francisco, California Hydropower Reform Coalition, and the People of the State of California, ex rel. California Department of Toxic Substances Control, Central Coast Regional Water Quality Control Board, Colorado River Basin Regional Water Quality Control Board, Lahontan Regional Water Quality Board, Central Valley Regional Water Quality Control Board, San Francisco Bay Regional Water Quality Control Board, North Coast Regional Quality Control Board, California Department of Fish and Game, California Department of Forestry and Fire Protection, California Department of Water Resources, California Environmental Protection Agency, California Highway Patrol, California Department of Education, Bay Conservation Development Commission, Resources Agency, State Lands Commission, California Department of Parks and Recreation, California Department of General Services, California Coastal Commission, and California Department of Transportation.

The following parties appeared as objectors in the bankruptcy court but did not appear as appellees in the district court or as appellants in the court of appeals: the City of Redwood City, the California Counties of Alameda, Fresno, Kern, Sacramento, San Luis Obispo, Santa Barbara, Santa Clara, Siskiyou, and Sonoma, the United States of America (on behalf of the U.S. Environmental Protection Agency), and the Official Committee of Unsecured Creditors.

RULE 29.6 STATEMENT

Petitioner PG&E Corporation is the corporate parent of petitioner Pacific Gas and Electric Company and is the only publicly held company that owns 10% or more of its stock. Petitioner PG&E Corporation has no parent companies and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pacific Gas and Electric Company and PG&E Corp. (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-29a) is published as amended at 350 F.3d 932. The opinions of the district court (*id.* 30a-62a) and the bankruptcy court (*id.* 63a-110a) are published at 283 B.R. 41 and 273 B.R. 795, respectively.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on February 25, 2004. Pet. App. 111a-112a. Justice O'Connor subsequently extended the time to file a petition for certiorari to and including July 23, 2004. App. No. 03A938. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

11 U.S.C. 1123(a)(5) provides, in relevant part:

> Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall * * * provide adequate means for the plan's implementation, such as –
>
> (A) retention by the debtor of all or any part of the property of the estate;
>
> (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
>
> (C) merger or consolidation of the debtor, with one or more persons;
>
> (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate

among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor * * *.

STATEMENT OF THE CASE

1. Petitioner Pacific Gas and Electric Co. ("PG&E") is a public utility that owns and operates electric generation facilities, electric and gas transmission facilities, and retail distribution facilities. It is subject to regulation by an array of federal, state, and local entities. Pet. App. 4a.

As a regulated public utility, PG&E traditionally operated under the historical "regulatory compact": it undertook to serve all the electric and gas customers in its service territory in exchange for rates that allowed it to recover its costs of providing service and its investment in facilities serving the public, as well as affording an opportunity to earn a reasonable rate of return. See *Bluefield Water Works & Improvement Co.* v. *Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties * * *.").

Beginning in 1998, the State of California implemented a plan partially to deregulate its electricity market. See C.A. Excerpts of Record ("C.A. E.R.") 253. As part of that plan, the State required PG&E and other California investor-owned

utilities to divest a large portion of their electric generation assets. *Ibid.* The utilities' remaining power output was sold into a central power pool, from which the power requirements of their retail customers would be met. *Ibid.*

Beginning in June 2000, prices for the electric power that the State obligated PG&E to purchase on the wholesale market began to increase markedly, reaching unprecedented levels in November 2000 and subsequent months. C.A. E.R. 302. By the end of February 2001, PG&E had lost billions of dollars on its retail sales of electricity because the state entity responsible for regulating PG&E, respondent California Public Utilities Commission ("CPUC"), refused to allow PG&E to recover in its retail rates the state-mandated costs it was incurring to buy electricity for its customers. C.A. Supplemental Excerpts of Record 76-77, 96.

2. PG&E was ultimately forced to turn to the bankruptcy court for relief, filing a Chapter 11 reorganization petition on April 6, 2001. Later that year, PG&E filed a reorganization plan, which proposed to disaggregate the utility into four new corporations. See Pet. App. 4a. One company, Electric Generation LLC, would own PG&E's generation assets. Two other companies, ETrans LLC and GTrans LLC, would own PG&E's electric and gas transmission assets, respectively. The fourth company, Reorganized PG&E, would engage in the retail distribution of electricity and gas.

The reorganization plan contemplated continued state, local, and federal regulation of the ongoing operations of each company. When the reorganization transactions themselves were implemented, state and local laws that purported to trump the bankruptcy court's authority to implement the plan would be preempted, as in all bankruptcies. Going forward, however, the operations of the PG&E entities would be fully subject to state and local regulation. The distribution company, Reorganized PG&E, would (like other electric distribution companies in the state) remain fully subject to regulation as a public utility by the State of California.

The California Attorney General, the CPUC, and other governmental bodies objected to PG&E's proposed plan of reorganization on the ground that its implementation was prohibited by state law. See Pet. App. 7a. Principally, they asserted that California law prohibits public utilities from transferring any generation facilities until the year 2006 (*ibid.* (citing Cal. Pub. Util. Code 377)), and that a utility must obtain CPUC approval before transferring any asset (*id.* 32a (citing Cal. Pub. Util. Code 851)).

As noted, petitioners contend that these obstacles to the implementation of the plan of reorganization were, as in every bankruptcy proceeding, preempted by federal law. In particular, petitioners contend that preemption arises from Section 1123(a)(5) of the Bankruptcy Code. The statute provides in relevant part that "[n]otwithstanding *any* otherwise applicable nonbankruptcy law, a plan [of reorganization] shall * * * provide adequate means for the plan's implementation." 11 U.S.C. 1123(a)(5) (emphasis added). The statute provides that "adequate means" include, for example, the transfer or sale of estate property, the issuance of securities, the curing of defaults, and the "satisfaction or modification of any lien." *Ibid.*

3. The bankruptcy court rejected petitioners' interpretation of Section 1123(a)(5). See Pet. App. 101a. The court construed the express preemptive effect of Section 1123(a)(5) to be extremely narrow, limited to state laws that impose requirements "about what must go into the plan." *Id.* 80a. Section 1123(a)(5), the court concluded, merely "direct[s] that adequate information be provided that would enable a hypothetical investor typical of holders of claims or interests of a relevant class to make an informed judgment about the plan." *Id.* 84a. "It does not," the bankruptcy court

emphasized, "have to be read as an 'empowering' statute * * *." *Id.* 80.[1]

4. On petitioners' appeal, the district court reversed. The court found it notable that "every court except the bankruptcy court below to have considered § 1123(a)(5) has concluded that this section contains an express preemption of nonbankruptcy laws that would otherwise apply to the restructuring transactions provided for in a reorganization plan." Pet. App. 40a. In particular, the court noted, the Fourth Circuit had expressly held in *Universal Cooperatives, Inc.* v. *FCX, Inc.* (*In re FCX, Inc.*), 853 F.2d 1149 (1988), cert. denied, 489 U.S. 1011 (1989), that Section 1123(a)(5) affirmatively authorizes the listed reorganization transactions and preempts contrary nonbankruptcy law. See Pet. App. 42a.

The district court rejected the bankruptcy court's interpretation of Section 1123(a)(5) as "merely a 'directive' statute" that simply requires that a reorganization plan provide "adequate information." Pet. App. 45a (internal quotation marks omitted). Under the bankruptcy court's interpretation, the district court explained, the phrase "notwithstanding any otherwise applicable nonbankruptcy law" would "add[] little to the provisions of the section"; indeed, respondents and the bankruptcy court "have trouble

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[1] The bankruptcy court certified its order with regard to express preemption for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b), made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7054(a) and 9014. See Pet. App. 35a.

The bankruptcy court separately held that petitioners' proposed reorganization plan "could be confirmed if Proponents are able to establish with particularity the requisite elements of implied preemption" – *viz.*, that "enforcing such state law would be an 'obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws." Pet. App. 94a. That implied preemption ruling is not at issue here.

coming up with *any* otherwise applicable nonbankruptcy laws that this phrase would override." *Id.* 57a (emphasis added). Further, not only is "[t]he term 'notwithstanding' * * * well recognized as a term used to express broad preemptive intent," but "the phrase 'notwithstanding any other applicable nonbankruptcy law' clearly expresses an intent affirmatively to authorize actions that are otherwise prohibited by nonbankruptcy law, which accords with PG&E's interpretation of the section." *Ibid.*

The district court similarly rejected respondents' argument that petitioners' construction of Section 1123(a)(5) would immunize a debtor from nonbankruptcy law after emerging from Chapter 11. The court emphasized that "PG&E does not contend that its reorganization plan has the effect of preempting application of nonbankruptcy law that would apply to the reorganized PG&E and the new entities after reorganization. Rather, PG&E explicitly concedes that the four companies emerging from bankruptcy will be subject to all applicable state and federal law on a going-forward basis." Pet. App. 33a.

5. On respondents' appeal, the Ninth Circuit in turn reversed and held that Section 1123(a)(5) expressly preempts only a limited field of state law that would preclude a duly confirmed plan of reorganization. Pet. App. 3a. The court of appeals did not adopt the reasoning of the bankruptcy court, of the district court, or indeed of any other court that had previously construed Section 1123(a)(5). Instead, the Ninth Circuit pioneered a wholly novel interpretation: that the statute expressly preempts only state laws "relating to [a debtor's] financial condition." *Ibid.* The court of appeals gave Section 1123(a)(5) exactly the same preemptive scope as another provision of the Bankruptcy Code, 11 U.S.C. 1142(a), despite the very different text of the two statutory sections. Section 1142(a) provides that, once a reorganization plan is confirmed and the restructuring transactions take effect, the reorganized debtor and others "shall carry out the plan" "notwithstanding any otherwise applicable nonbankruptcy

law, rule, or regulation *relating to financial condition*" (emphasis added). Although Sections 1123(a)(5) and 1142(a) address different issues, the panel construed them as having the identical preemptive scope. See Pet. App. 17a. According to the panel, Section 1123(a)'s "notwithstanding" clause makes "clear that the rules governing what must be in a confirmable plan are contained in § 1123(a) and not in otherwise applicable bankruptcy laws. That is, a plan proposed in conformity with § 1123(a) could be confirmed, and a confirmed plan would then have the preemptive effect specified in § 1142(a)." Pet. App. 26a.

In rejecting the district court's broader reading of Section 1123(a)(5)'s preemptive effect, the Ninth Circuit relied on two presumptions. First, the panel applied the general "presumption against preemption" – *viz.*, "that Congress does not undertake lightly to preempt state law, particularly in areas of traditional state regulation." Pet. App. 18a (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

Second, the court of appeals applied a presumption that, "absent clear indications to the contrary, * * * Congress did not intend to change preexisting bankruptcy law or practice in adopting the Bankruptcy Code in 1978 or in amending it in 1984." Pet. App. 19a. Specifically, the panel concluded that Section 1123(a)(5) expressly preempts state laws "only to the extent that such laws were already preempted before the addition of the 'notwithstanding' clause to § 1123(a) by amendment in 1984." Pet. App. 3a. Because Section 1142(a) was already enacted as of 1978, the court of appeals concluded that the "preemptive effect [of the bankruptcy laws], expressly stated in the 'notwithstanding' clause of § 1142(a), was limited to otherwise applicable nonbankruptcy laws 'relating to financial condition.'" *Ibid.*

6. The court of appeals subsequently denied rehearing and rehearing en banc. Pet. App. 112a. This petition followed.[2]

REASONS FOR GRANTING THE WRIT

This case presents a question of extraordinary importance for the proper functioning of the bankruptcy system. Section 1123(a)(5) of the Bankruptcy Code provides literally the only substantive authority for numerous reorganization transactions that are critical to bankruptcy practice in *all* Chapter 11 cases. By holding that Section 1123(a)(5) expressly preempts only a limited subset of state laws relating to "financial condition," the Ninth Circuit has not only called this vital statutory authority into question, but has also construed the statute in conflict with the holdings of the three other courts of appeals that have spoken to the matter, as well

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[2] After the Ninth Circuit's ruling, the bankruptcy court confirmed an alternative plan of reorganization – approved by the CPUC – that does not rely on the express preemptive effect of Section 1123(a)(5). See *In re Pac. Gas & Elec. Co.*, 304 B.R. 395 (Bankr. N.D. Cal. 2004). PG&E has since emerged from bankruptcy. See *PG&E "Puts the Energy Crisis Behind" It, Emerges From Three Years in Bankruptcy*, INSIDE FERC, Apr. 19, 2004, at 12. However, two separate appeals of the bankruptcy court's order confirming the reorganization plan are pending: one by two individual CPUC commissioners and another by the City of Palo Alto. Petitioners fully expect that both appeals will be resolved in their favor and that the confirmation order will be affirmed; indeed, on July 15, 2004, the district court entered an order dismissing the commissioners' appeal for lack of standing. *Lynch* v. *Cal. Pub. Util. Comm'n*, No. C-04-0580 VRW (N.D. Cal. July 15, 2004) (order granting motion to dismiss appeal). Until both appeals are finally resolved, however, petitioners must simultaneously pursue a challenge to the Ninth Circuit's express preemption decision to protect their right to proceed under their original reorganization plan, if necessary, in the unlikely event that either challenge to the confirmed plan should succeed.

as the holdings of this Court. The decision below further conflicts with the interpretation of similar preemption clauses by this Court and by numerous other courts of appeals. Finally, the Ninth Circuit's holding conflicts with this Court's precedents regarding the "presumption against preemption." Certiorari accordingly should be granted.

I. The Ninth Circuit's Construction of Section 1123(a)(5) Conflicts with the Holdings of the Courts of Appeals for the Third, Fourth, and Tenth Circuits and of This Court Regarding a Question of Law That Is Central to the Administration of the Bankruptcy Laws.

By limiting Section 1123(a)(5)'s express preemptive effect to state laws relating to a debtor's financial condition, the decision below not only creates a square circuit conflict with the decisions of other courts of appeals – which have explicitly held that Section 1123(a)(5) is an "empowering" statute that overrides *any* contrary state law – but also conflicts with this Court's own construction of Section 1123(a)(5). Moreover, because Section 1123(a)(5) is essential to the administration of the bankruptcy laws in a large proportion of reorganizations, the decision below will have serious adverse consequences for the proper functioning of the bankruptcy system.

A. The Decision Below Squarely Conflicts With the Holdings of Other Courts of Appeals Regarding the Express Preemptive Effect of Section 1123(a)(5).

The Ninth Circuit's decision is in square conflict with the Fourth Circuit's decision in *Universal Cooperatives, Inc.* v. *FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (1988), cert. denied, 489 U.S. 1011 (1989), which this Court has cited with approval regarding its interpretation of Section 1123(a)(5) as "supersed[ing] all other laws." See *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993), *discussed infra* at 16. In *FCX*, the Fourth Circuit held that Section 1123(a)(5)

expressly empowers bankruptcy courts to approve plans of reorganization that override any contrary state law. By contrast, the Ninth Circuit held that the statute's preemptive effect is limited to "otherwise applicable nonbankruptcy law[s], rule[s], or regulation[s] relating to financial condition." Pet. App. 8a.

In *FCX*, the Fourth Circuit explained that, "[b]y its plain language * * * § 1123(a)(5)(D) overrides nonbankruptcy law restrictions on the distribution of collateral." 853 F.2d at 1154. The Fourth Circuit held that Section 1123(a)(5) goes beyond "simply provid[ing] a means to exercise the debtor's pre-bankruptcy rights." *Id.* at 1155. Rather, the court opined that all of the state-law provisions that purported to hinder the reorganization plan were preempted because Section 1123(a)(5) "is an empowering statute": "'The alternatives set forth in §1123(a)(5) are self-executing. That is, the plan may propose such actions notwithstanding nonbankruptcy law or agreements.'" 853 F.2d at 1155 (emphasis added) (quoting 5 COLLIER ON BANKRUPTCY ¶ 1123.01[5] (15th ed. 1985)).

Other courts of appeals have reached the same conclusion as the Fourth Circuit regarding Section 1123(a)'s express preemptive effect. *None* has agreed with the Ninth Circuit that the statute is limited to laws related to financial condition. In *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 493 (1997), the Third Circuit described Section 1123(a) as a prototypical example of "the explicit language that Congress uses when it intends to displace state nonbankruptcy law * * *." Similarly, the Tenth Circuit has concluded that, under Section 1123(a), "the bankruptcy court is authorized to modify a creditor's state law property rights through a chapter 11 reorganization plan." *Wade* v. *Bradford*, 39 F.3d 1126, 1130 (1994). Moreover, the district courts and bankruptcy courts uniformly agree,[3] as

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[3] See, *e.g.*, *Pub. Serv. Co. of N.H.* (*PSNH*) v. *New Hampshire* (*In re Pub. Serv. Co. of N.H.*), 108 B.R. 854, 882 (Bankr. D.N.H.

does the leading bankruptcy commentator.[4] Petitioner is aware of *no* other authority, and respondents identified none below, holding that the preemptive effect of Section 1123(a)(5) is limited to state laws "relating to financial condition."

1989) ("In terms of the literal language of § 1123(a)(5) it seems obvious that that section on its face contemplates that restructuring transactions necessary to a plan of reorganization may be provided notwithstanding nonbankruptcy law * * *."); *First Union Nat'l Bank* v. *Gibbons* (*In re Princeton-New York Investors, Inc.*), 219 B.R. 55, 63 n.8 (D.N.J. 1998) (Section 1123(a) "exemplif[ies] explicit preemption"); *In re Clarksville Hospitality Corp.*, No. 93-17668-CJK, 1996 Bankr. LEXIS 340, at *8 (Bankr. D. Mass. Apr. 4, 1996) ("The provisions of Chapter 11 of the Bankruptcy Code preempt state laws with respect to the treatment of secured tax claims, including the appropriate interest rate for the payment of such claims over time.") (citing Sections 1123(a) and (b)); *In re Kizzac Mgmt. Corp.*, 44 B.R. 496, 504 (Bankr. S.D.N.Y. 1984) (Section 1123(a)(5)(E), which authorizes the satisfaction or modification of any lien pursuant to a plan, takes precedence over nonbankruptcy law).

[4] The *Collier* treatise explains that "[t]he alternatives set forth in section 1123(a)(5) are self-executing – that is, the plan may propose such actions notwithstanding nonbankruptcy law or agreement." 7 COLLIER ON BANKRUPTCY ¶ 1123.01[5] (15th rev. ed. 1996 & Supp. 2004). Citing the Fourth Circuit's decision in *FCX* with approval, *Collier* also reiterates the conclusion that Section 1123(a) broadly preempts state law that would interfere with the terms of a reorganization: "Because plans are explicitly authorized by section 1123(a) to include certain provisions '[n]otwithstanding any otherwise applicable nonbankruptcy law,' section 1123(a)(5)(D) 'overrides nonbankruptcy law restrictions on the distribution of collateral to satisfy a claim secured by the same.'" *Id.* ¶ 1123.01[5][c] & n.25 (quoting *FCX*, 853 F.2d at 1154). *Collier* also cites and quotes the preemption holding of the *PSNH* opinion with approval.

B. The Decision Below Conflicts with This Court's Own Understanding of Section 1123(a)(5) as an Empowering Provision.

This Court has also addressed the role of Section 1123(a)(5) under the Bankruptcy Code, holding that the statute is the source of authority for a bankruptcy court to approve the transactions necessary to implement a plan of reorganization. In *Holywell Corp.* v. *Smith*, 503 U.S. 47, 55 (1992), the Court held, *inter alia*, that a Chapter 11 trustee was a "transferee" of an individual debtor's property rather than a fiduciary of the individual debtor's estate. This Court explained that "[t]he Bankruptcy Code expressly permits this arrangement" in Section 1123(a)(5)(B), which "*authoriz[es]* a plan to transfer 'all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan.'" *Ibid.* (emphasis added). The Ninth Circuit's construction of Section 1123(a)(5) as providing a much more limited authority – as authorizing only those implementing transactions that either are lawful under state or local law or otherwise would be prohibited by laws relating only to financial condition – thus conflicts with this Court's own expressed understanding of the statute.

C. The Decision Below Creates a Conflict on a Question of Law Whose Correct Resolution Is Essential to the Bankruptcy System.

The conflict furthermore has extraordinary importance for the orderly functioning of the bankruptcy system. There is no other provision in the Code – apart from Section 1123(a)(5) – which authorizes, for example, such basic bankruptcy tools as "merger or consolidation of the debtor," 11 U.S.C. 1123(a)(5)(C), "cancellation or modification of any indenture or similar instrument," *id.* § 1123(a)(5)(F), "extension of a maturity date or a change in an interest rate or other term of outstanding securities," *id.* § 1123(a)(5)(H), "amendment of the debtor's charter," *id.* § 1123(a)(5)(I), or "issuance of securities of the debtor, or of [certain specified

entities]," *id.* § 1123(a)(5)(J). Nor is there any other provision of positive federal law that authorizes any of these obviously vital kinds of restructuring transactions. That the Necessary and Proper Clause, coupled with the Bankruptcy Clause, *empowers* Congress to confer such authority upon the bankruptcy courts and the district courts is beyond cavil, but it clearly does not follow that the courts are empowered on their own to carve such authority out of the residual powers left to the States absent such a delegation from Congress. And we have long since outgrown the innocent time when federal courts felt free to deduce or invent powers by reaching into a corpus of general common law that has its source neither in state law nor in federal law but in the "brooding omnipresence." See generally *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2760, 2762 (2004); *id.* at 2770 (Scalia, J., concurring in part and concurring in the judgment (agreeing with the Court that, pursuant to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), no "general" common law exists)).

The decision below thus casts grave doubt on the viability of innumerable plans of reorganization that otherwise satisfy the bankruptcy court of their compliance with the Code. Nonbankruptcy law – including, as a number of the above examples illustrate, nonbankruptcy law unrelated to the debtor's "financial condition" – is often inconsistent with the central features of most reorganization plans. Indeed, "the very purpose of bankruptcy is to modify the rights of debtors and creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created obligations in many ways." 130 Cong. Rec. H1110 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier). To take the simplest examples, unless state law is overridden, a reorganization plan could not modify a lien, waive a default, or extend a maturity date, see 11 U.S.C. 1123(a)(5)(E), (G), & (H), without the creditor's consent. Yet, subject to the confirmation standards outlined in 11 U.S.C. 1129, these tools authorized by Section 1123(a)(5) are essential features of successful plans. See 7 COLLIER ON BANKRUPTCY, *supra*,

¶ 1123.01[5] ("[I]t is likely that the plan will *of necessity* embody some of the means of execution specified in section 1123(a)(5)." (emphasis added)). By contrast, neither the bankruptcy court and respondents nor the panel below has identified any laws that would be overridden pursuant to their interpretations of Section 1123(a)(5) as – respectively – "merely a 'directive' statute" requiring a plan to provide adequate information, Pet. App. 45a, and preempting only "otherwise applicable nonbankruptcy law relating to financial condition," *id.* 3a.

Because the decision below conflicts with decisions of other circuits and of this Court regarding the proper construction of Section 1123(a)(5), and because its holding will have serious adverse effects for the administration of the bankruptcy laws, certiorari should be granted.

II. The Decision Below Is Contrary to the Construction of Similar Clauses By This Court and By Other Courts of Appeals.

Clauses instructing that a statute be given effect "notwithstanding any" contrary provision of law are extraordinarily common in the U.S. Code, appearing in nearly every context of federal law. See, *e.g.*, 28 U.S.C. 636(b)(1) (authorizing nonconsensual reference of prisoner petitions to magistrate judge "[n]otwithstanding any provision of law to the contrary"); 42 U.S.C. 659(a) (authorizing garnishment of federal salaries to pay child support and alimony obligations "[n]otwithstanding any other provision of law"); 12 U.S.C. 51a (authorizing national banks, under certain circumstances, to issue preferred stock "[n]otwithstanding any other provision of law").

Section 1123(a)(5) of the Bankruptcy Code similarly directs that a plan of reorganization shall provide adequate means for its implementation "notwithstanding *any* otherwise applicable nonbankruptcy law" (emphasis added). The Ninth Circuit nonetheless held that the statute preempts only "otherwise applicable nonbankruptcy laws 'relating to

financial condition,'" Pet. App. 3a – a holding consistent with a line of authority in which that circuit has limited the scope of similar "notwithstanding" provisions. See, *e.g.*, *Northwest Forest Res. Council* v. *Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1167 (1996) ("[n]otwithstanding any other provision of law" does not preempt agency regulations governing contract awards); *Or. Natural Res. Council* v. *Thomas*, 92 F.3d 792, 796 (1996) ("notwithstanding any other law" is "best interpreted as requiring the disregard only of environmental laws, not all laws otherwise applicable"); *E.P. Paup Co.* v. *Director, Office of Workers Comp. Programs*, 999 F.2d 1341, 1348 (1993) ("[n]otwithstanding any other provision of law" does not expressly preempt state reimbursement scheme); *Golden Nugget, Inc.* v. *American Stock Exch., Inc.*, 828 F.2d 586, 589-90 (1987) (per curiam) ("[n]otwithstanding any other provision of law" did not preempt state regulation of the options trading market).

This entire line of Ninth Circuit authority conflicts with a long line of precedents of this Court and of other circuits construing indistinguishable preemption provisions in a manner consistent with the broad terms of their plain text. Contrary to the decision below, those holdings expressly indicate that the phrase "notwithstanding any otherwise applicable nonbankruptcy law" encompasses *all* state law, not merely laws relating to financial condition.

Thus, in *Patterson* v. *Shumate*, 504 U.S. 753, 758-59 (1992), this Court held that Section 541 of the Bankruptcy Code (which refers to restrictions on the transfer of interests in trusts "under applicable nonbankruptcy law") encompasses "any relevant nonbankruptcy law" – not simply state laws relating to financial condition. In a pointed concurrence, Justice Scalia explained that the previous failure of some lower courts to give the statute its naturally broad meaning "calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it

any longer makes sense to talk of 'a government of laws, not of men.'" 504 U.S. at 766 (Scalia, J., concurring).

In *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), this Court held that the Railroad Retirement Act, which protects the benefits of railroad workers "'[n]otwithstanding any other law * * * of any State,'" "pre-empts all state law that stands in its way." *Id.* at 584 (alterations in original). Such language, this Court explained, "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." *Ibid.*

In *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), this Court held that a "notwithstanding" provision in a contract with the Department of Housing and Urban Development precluded a claim by real estate developers that they were entitled to annual formula-based rent increases. Because the contract provided that "[n]otwithstanding any other provisions," contract rent increases "shall not result in material differences" between rents under the contract and market value, this Court found it "clear beyond peradventure that [the provision] provides that contract rents 'shall not' be adjusted so as to exceed materially the rents charged for 'comparable unassisted units' on the private rental market—even if other provisions of the contract might seem to require such a result." *Id.* at 18-19. This Court explained: "As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Id.* at 18. The Court noted with approval that federal appellate courts had repeatedly read the term "notwithstanding" "to supersede other laws, stating that [a] clearer statement is difficult to imagine." *Ibid.* (internal quotation marks omitted) (citing, *inter alia*, the Fourth Circuit's decision in *Universal Cooperatives, Inc.* v. *FCX, Inc.*, 853 F.2d 1149, 1154 (1988), cert. denied, 489 U.S. 1011 (1989)).

Similarly, in *Long Island Rail Road Co.* v. *Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1, 5 (1978) (per curiam), this Court considered a statutory amendment that directed the Interstate Commerce Commission to permit railroads to impose interim rate increases while their petitions seeking permanent rate increases to offset the cost of new retirement tax liabilities were pending, "notwithstanding any other provision of law." The Court held that the amendment superseded the Interstate Commerce Commission's general authority to suspend railroad rates, explaining that the amendment

> was enacted to ensure that the much-needed funds would get to the railroads as soon as possible: once the interim rates were filed, they could not be suspended until final rate determinations by the Commission. While the Commission normally has the power under § 15(7) of the Interstate Commerce Act to suspend rates for a period not to exceed seven months, Congress deprived the Commission of even that limited authority in § 15a(6)(b), which begins with the words: "Notwithstanding any other provision of law."

Ibid.

The courts of appeals other than the Ninth Circuit have similarly construed "notwithstanding" clauses to supersede all other laws, including all state laws. Thus, in *Campbell* v. *Minneapolis Public Housing Authority*, 168 F.3d 1069 (1999), the Eighth Circuit relied on a "notwithstanding" clause in 42 U.S.C. 1437n(e)(1)(A) to reject the contention that a state housing authority's establishment of occupancy criteria pursuant to the statute violated various anti-discrimination laws. The court of appeals explained that the statute was intended to prevent illegal drug use and alcohol abuse, and that the statute's "notwithstanding" clause "signals that the [statute] supersedes other statutes that might interfere or hinder the attainment of [the statute's] objective." *Id.* at 1075. It further emphasized that "[t]he Supremacy Clause

permits Congress to enact legislation that supersedes all state and local law, as the express language of [the statute] shows Congress has done here." *Id.* at 1075 n.2.

Decisions of several other circuits are to the same effect. For example, in *Liberty Maritime Corp.* v. *United States*, 928 F.2d 413 (1991) (quoted in *Cisneros*, 508 U.S. at 18), the D.C. Circuit held that the clause "[n]otwithstanding any other provision of law" "supersede[d] *all other laws*," *id.* at 416 (emphasis added). Of note, that court expressly warned against a construction that would "fight[] the plain terms [of the statute by] essentially append[ing] to the 'notwithstanding' clause [a] proviso" limiting the clause's scope. *Id.* at 417. See also *Fed. Reserve Bank* v. *Thomas*, 220 F.3d 1235, 1247 n.12 (CA11 2000) (noting that "notwithstanding any other provision of law" clause in 12 U.S.C. 632 "means that *no other law* shall be construed to deprive the district courts of original jurisdiction over suits involving Federal Reserve Banks" (emphasis added)).

The Ninth Circuit's decision conflicts with holdings of other circuits and of this Court construing similar "notwithstanding" language. This Court's review is therefore amply warranted.

III. The Decision Below Conflicts With This Court's Construction of Multiple Preemption Provisions In a Single Statute.

By holding that Sections 1123(a)(5) and 1142(a) must be construed to mean the *same* thing, notwithstanding their very *different* texts, Pet. App. 3a, the decision below also conflicts with this Court's instruction that courts must give effect to the distinct language of multiple preemption provisions in a single statute. In *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001), for example, this Court held that certain Massachusetts cigarette advertising regulations were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.*, which provides – in relevant part – that "[n]o requirement or prohibition based on smoking and

health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," *id.* § 1334(b). The Court rejected arguments that the state regulations were not preempted because they were not "based on smoking and health" and governed the location, rather than content, of cigarette advertising, holding instead that Section 1334(b) "reaches *all* 'requirements' and 'prohibitions' 'imposed under State law.'" 533 U.S. at 548. In so holding, the Court specifically contrasted the broad language of Section 1334(b) with the narrower language of another preemption provision in the same statute, 15 U.S.C. 1334(a), which provides only that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." The Court explained that "[w]ithout question, [Section 1334(b)] is more expansive than [Section 1334(a)]; it employs far more sweeping language to describe the state action that is pre-empted. We must give meaning to each element of the pre-emption provision." 533 U.S. at 542.

The Court's decision in *Lorillard* is simply a specific application of the general principle that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)). See also *Crawford* v. *Burke*, 195 U.S. 176, 190 (1904) ("[A] change in phraseology creates a presumption of a change in intent, and * * * Congress would not have used such different language * * * without thereby intending a change of meaning.").

Although in other cases a court might find this strong presumption rebutted based on a substantial showing that Congress inadvertently used contrasting language, the evidence identified by the Ninth Circuit in this case is not remotely as strong. Rather, the court pointed to one sentence

in which Senator DeConcini indicated that, under Section 1123 as enacted in 1978, "If the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable nonbankruptcy law in accordance with section 1142(a) of title 11." Pet. App. 16a. The court also pointed to the fact that in 1984 Congress amended both Section 1123(a) and the title of Section 1142 to substitute the word "implementation" for "execution." Such evidence is, however, a thin reed on which to rest the panel's decision. Sections 1123 and 1142 are located in different subchapters of Chapter 11 – entitled "The Plan" and "Postconfirmation Matters," respectively – and address different stages in the reorganization process. At most, this evidence demonstrates that Congress intended the two statutes to serve complementary roles, not that Congress intended Section 1123(a)(5)'s preemptive effect to be limited by Section 1142(a)'s "relating to financial condition" language.

IV. The Decision Below Conflicts With This Court's Precedents Regarding the "Presumption Against Preemption."

The Ninth Circuit held that its decision was supported by the "presumption against preemption," which the court concluded is "just as strong in bankruptcy as in other areas of federal legislative power." Pet. App. 19a. In so holding, however, the decision below conflicts with this Court's precedent making clear that the presumption is not triggered when a federal statute is at issue and, further, when the area to be regulated is inherently federal in character.

In *New York* v. *FERC*, 535 U.S. 1 (2002), this Court explicitly and emphatically rejected the states' attempt to rely on the "presumption against preemption" in construing the Federal Power Act – an attempt that closely paralleled the Ninth Circuit's construction of Section 1123(a)(5). This Court carefully distinguished the construction of a federal statute (which, it held, is not subject to the presumption) from the determination of whether particular state laws are

impliedly preempted by a federal statute under the rubric of "conflict" preemption. Indeed, this Court explained that the very decisions principally invoked by the Ninth Circuit in this case apply only "when a controversy concern[s] not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." 535 U.S. at 17-18 (discussing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), and *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)). Thus, this Court held that it was required to determine the meaning of Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b), based on the statute's plain meaning: "Such a case does not involve a 'presumption against preemption,'" the Court explained, but must be resolved "without any presumption one way or the other." *Id.* at 18.

Subsequently, in *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management*, 124 S. Ct. 1756, 1763 (2004), this Court declined to invoke the "presumption against pre-emption" to construe Section 209(a) of the Clean Air Act, 42 U.S.C. 7543(a), which prohibits states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or * * * engines." Instead, this Court emphasized that the construction of the statute "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 1761 (quoting *Park'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). This Court then rejected the lower courts' holding that Section 209(a) – which it characterized as an "express preemption provision" – invalidated state restrictions on vehicle *sales* but did not preempt similar restrictions on vehicle *purchases*: "We decline to read into §209(a) a purchase/sale distinction that is not to be found in the text of §209(a) or the structure of the CAA." *Id.* at 1763. Accordingly, this Court's precedents make clear that the meaning of Section 1123(a)(5) must be

resolved without resort to any "deference" to state law or any "presumption against preemption."

The decisions on which the Ninth Circuit relied to invoke the "presumption against preemption" are simply inapposite. The presumption employed by this Court in those cases – *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), and *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) – did not rely upon the mere existence of conflicting state law as such. Rather, in both cases, the Court presumed that, in enacting certain statutory provisions, Congress intended to incorporate clear and well-established legal principles that had long been associated with the predecessors of those provisions. Thus, in *Midlantic*, this Court presumed that, when Congress codified "the judicially developed rule of abandonment" in 11 U.S.C. 554(a), 474 U.S. at 501, it also intended to incorporate the "firmly established" judicially developed exceptions associated with this rule, *id.* at 504 – exceptions that included deference to "state laws or regulations that are reasonably designed to protect the public's health or safety," *id.* at 496. Similarly, in *BFP*, this Court relied upon a presumption that, when the states had never invalidated a foreclosure sale under state fraudulent transfer law, 511 U.S. at 542, Congress did not intend to allow federal fraudulent transfer law to be used to invalidate a foreclosure sale, *id.* at 543.

In any event, the "presumption against preemption" has no place in the context of the Bankruptcy Code, because "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Like the maritime regulation at issue in *Locke*, bankruptcy is an area in which there has been a history of pervasive federal presence. Article I of the Constitution thus requires Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Congress has regularly exercised this quintessentially federal power from the earliest days of the

Republic. *E.g.*, 2 Stat. 19 (1800); 5 Stat. 440 (1841); 14 Stat. 517 (1867). "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994 (CA3 1984)). Indeed, even more so than in the maritime setting, the presumption against preemption is particularly unwarranted in bankruptcy because, as explained above, the readjustment of state law rights and obligations is one of its very objects; the Ninth Circuit's application of the presumption against preemption thus has serious consequences not just for the proper construction of Section 1123(a)(5), but for virtually every feature of the Bankruptcy Code. Moreover, the regulation of very significant aspects of the energy industry, including substantial aspects of PG&E's existing operations – namely, the sale and transmission of power in interstate commerce – is firmly within the federal, rather than state, domain. See *New York* v. *FERC*, 535 U.S. 1, 4-7 (2002). Thus, any presumption against preemption simply does not apply here.

Because the decision below conflicts not only with the decisions of other courts of appeals, but also with this Court's precedents, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 2004

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 02-16990, No. 02-80113

PACIFIC GAS AND ELECTRIC COMPANY; PG&E CORPORATION,

Plaintiffs-Appellees,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. California Dept. of Toxic Substances Control, Central Coast Regional Water Quality Control Board, Colorado River Basin Regional Water Quality Control Board, State Water Resources Control Board, Lahontan Regional Water Quality Board, Central Valley Regional Water Quality Control Board, San Francisco Bay Regional Water Quality Control Board, North Coast Regional Quality Control Board, California Dept. Fish and Game, California Dept. of Forestry and Fire Protection, California Dept. Water Resources, California Environmental Protection Agency, California Highway Patrol, California Dept. of Education, Bay Conservation Development Commission, Resources Agency, State Lands Commission, California Dept. of Parks and Recreation, California Dept. General Services, California Coastal Commission; PEOPLE OF THE STATE OF CALIFORNIA, ex rel. California Dept. Transportation; CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA HYDROPOWER REFORM COALITION; CALIFORNIA PUBLIC UTILITIES COMMISSION,

Defendants-Appellants,

and

CITY OF REDWOOD CITY; CALIFORNIA COUNTIES OF ALAMEDA, FRESNO, KERN, SACRAMENTO, SAN LUIS OBISPO, SANTA BARBARA, SANTA CLARA, SISKIYOU, SONOMA, AND THE CITY AND COUNTY

OF SAN FRANCISCO; UNITED STATES OF AMERICA, on behalf of the US Environmental Protection Agency; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Defendants.

and

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. California Dept. Transportation; CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA HYDROPOWER REFORM COALITION; CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioners,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,

Respondent.

May 14, 2003, Argued and Submitted
November 19, 2003, Filed

Before: Michael Daly Hawkins, William A. Fletcher, Circuit Judges, and Samuel P. King,* Senior Judge.

* The Honorable Samuel P. King, Senior District Judge for Hawaii, sitting by designation.

OPINION

W. FLETCHER, Circuit Judge.

The issue presented in this interlocutory appeal is the extent to which a reorganization plan proposed under 11 U.S.C. § 1123(a)(5) preempts otherwise applicable nonbankruptcy law. Section 1123(a) was enacted as part of the Bankruptcy Code in 1978. That section specifies what must be included in a reorganization plan under Chapter 11 and closely parallels § 216(10) of the predecessor Bankruptcy Act. Section 1123(a)(5) provides, in part, "notwithstanding any otherwise applicable nonbankruptcy law a [reorganization] plan shall . . . provide adequate means for the

plan's implementation[.]" When § 1123(a) was originally enacted in 1978, it did not contain the clause "notwithstanding any otherwise applicable nonbankruptcy law," just as § 216(10) of the Bankruptcy Act contained no such clause. The "notwithstanding" clause was added to § 1123(a) by amendment in 1984.

Section 1142(a) was also enacted as part of the Bankruptcy Code in 1978. That section prescribes duties associated with the implementation of an approved reorganization plan under Chapter 11 and closely parallels § 224(2) of the predecessor Bankruptcy Act. Section 1142(a) provides, "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the [reorganization] plan and shall comply with any orders of the court." The only relevant difference between § 1142(a) and its predecessor § 224(2) is that the clause "notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition" was added in 1978.

We hold that a reorganization plan proposed under § 1123(a)(5) expressly preempts otherwise applicable non-bankruptcy laws only to the extent that such laws were already preempted before the addition of the "notwithstanding" clause to § 1123(a) by amendment in 1984. That is, we hold that the addition of the "notwithstanding" clause to § 1123(a) was merely a clarification and confirmation of the preemptive effect of a reorganization plan that already existed under the 1978 Bankruptcy Code. That preemptive effect, expressly stated in the "notwithstanding" clause of § 1142(a), was limited to otherwise applicable nonbankruptcy laws "relating to financial condition."

We reverse the decision of the district court and remand for further proceedings.

I. Background

Appellee Pacific Gas & Electric Company ("PG&E") is a large, vertically-integrated public utility in California, currently subject to regulation by various federal, state, and local entities. PG&E owns and operates electric generation facilities, electric and gas transmission facilities, and retail distribution facilities. On April 6, 2001, PG&E filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On December 19, 2001, PG&E and its corporate parent PG&E Corporation ("Proponents") filed a First Amended Reorganization Plan ("Plan") accompanied by a First Amended Disclosure Statement. The Plan has since been amended, but the amendments do not affect our legal analysis.

Among other things, the Plan contains a proposal for the disaggregation of PG&E into four new corporations, each of which would be owned by PG&E's parent corporation. The four proposed corporations are: (1) Electric Generation LLC ("Gen"), which would own PG&E's generation assets; (2) ETrans LLC ("ETrans"), which would own PG&E's electric transmission assets; (3) GTrans LLC ("GTrans"), which would own PG&E's gas transmission assets; and (4) Reorganized PG&E, which would engage in retail distribution of electricity and gas. Pursuant to the Plan, Reorganized PG&E would remain subject to regulation by the California Public Utility Commission ("CPUC") after the proposed disaggregation. However, Gen, ETrans, and GTrans would not. Rather, they would be subject to the exclusive regulatory jurisdiction of the Federal Energy Regulatory Commission. If PG&E is not disaggregated, all of PG&E would remain subject to regulation by the CPUC.

The Disclosure Statement filed in conjunction with the Plan makes clear the extremely broad preemptive effect PG&E attributes to the "notwithstanding" clause of § 1123(a). Section 1123(a)(5) provides, in part, "notwithstanding any otherwise applicable nonbankruptcy law, a [reorganization]

plan shall . . . provide adequate means for the plan's implementation[.]" In accordance with Proponents' reading of § 1123(a)(5), the Disclosure Statement ("Statement") describes the means proposed for implementing the Plan, and states that the Plan preempts various state and local laws:

> Section 1123(a) of the Bankruptcy Code preempts any otherwise applicable non-bankruptcy law that may be contrary to its provisions. Accordingly, a plan may contain certain provisions that would not normally be permitted under non-bankruptcy law. For example, section 1123(a)(5) of the Bankruptcy Code authorizes, among other things, the sale or transfer of assets by the Debtor without the consent of the State or the California Public Utilities Commission (the "CPUC").
>
> * * *
>
> Section 1123(a) of the Bankruptcy Code preempts state regulation from interfering with the implementation and consummation of the Plan. Accordingly, the Proponents contend that the Confirmation Order approving the Plan and authorizing the transactions pursuant to the Plan will preempt "otherwise applicable nonbankruptcy law" in the following areas: (1) any approval or authorization of the CPUC or compliance with the California Public Utilities Code or CPUC rules, regulations or decisions otherwise required to transfer public utility property (including authorization to construct facilities), issue securities and implement the Plan; and (2) the exercise of discretion by any other state or local agency or subdivision to deny the transfer or assignment of any of the Debtor's property, including existing permits or licenses, or the issuance of identical permits and licenses on the same terms and conditions as the Debtor's existing permits and licenses where both

> the Reorganized Debtor and one or more of ETrans, GTrans and Gen require such permit for their post Effective Date operations. Such preemption pursuant to section 1123(a) of the Bankruptcy Code shall occur at the time the Plan is implemented.

The Statement lists a number of specific sections of the California Public Utility Code and decisions by the CPUC that Proponents contend are preempted by the Plan pursuant to the "notwithstanding" clause of § 1123(a)(5), but the list is not exhaustive. The Statement provides, "the Confirmation Order will supersede any law, regulation or rule that might otherwise apply to the Restructuring Transactions and the implementation of the Plan, whether specified here or not. The statutes, rules, orders or decisions thus preempted include, but are not limited to, the following: [listing specific statutory sections and CPUC decisions]."

The Statement also provides that otherwise applicable permitting and licensing requirements are preempted pursuant to § 1123(a)(5). Although Proponents insist in their brief that "the Plan does not seek to supercede or 'preempt' federal law at all," the Statement mentions federal as well as state and local permits and licenses. The Statement provides:

> The transfer or reissuance of the vast majority of permits and licenses issued by most state agencies and political subdivisions and federal agencies appears to be ministerial or governed by objective criteria that make it unlikely that the agencies could act or fail to act in a way that would interfere with consummation of the Plan. As mentioned above, the Proponents intend to follow the established procedures for the transfer or reissuance of such permits and licences. For these permits or licenses for which otherwise applicable nonbankruptcy law precludes transfer or gives state or local officials discretion to deny the transfer or reissuance, the Proponents will rely on the protection of section

1123(a) to ensure that all of the reorganized companies obtain the permits and licenses they need to operate lawfully.

Appellants, the CPUC, the State of California, the City and County of San Francisco, and the California Hydropower Reform Coalition (collectively the "California parties") object to the Plan. The California parties contend that the Plan conflicts with a number of state laws and that these laws are not preempted by § 1123(a)(5). Most important, the California parties contend that the disaggregation contemplated by the Plan would violate § 377 of the California Public Utilities Code. Section 377 was passed by the California legislature in the wake of the energy crisis that plagued the state in the summer of 2000. It provides that "no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006." Cal. Pub. Util. Code § 377 (West 2003). The California parties also contend that the Plan is subject to and potentially conflicts with other state laws. For example, they contend that some of the transactions contemplated by the Plan must be subjected to environmental review under the California Environmental Quality Act.

Appearing as an amicus, the United States also objects to the Plan. Despite Proponents' assertion that they do not intend to use the Plan to displace any federal law, the United States contends that the Plan could, during its implementation, allow one or more of the four proposed corporations to do so. For example, the United States contends that federal statutes such as the Clean Air Act and the Clean Water Act could be preempted by the Plan pursuant to Proponents' construction of § 1123(a)(5). It also contends that the otherwise applicable requirement of a federal Nuclear Regulatory Commission license could be preempted by the Plan. Outside of bankruptcy, such a license would be required before PG&E could transfer ownership of the Diablo Canyon nuclear power plant to another entity, such as the newly created EGen.

The bankruptcy court rejected what it characterized as Proponents' "across-the-board, take-no-prisoners preemption strategy." It held that "there is no express preemption of non-bankruptcy law that permits a wholesale unconditional preemption of numerous state laws, some of which are identified in the Disclosure Statement and some of which are obscured by the phrase 'including but not limited to.'" The bankruptcy court concluded that some nonbankruptcy laws may be impliedly preempted by the Plan under § 1123(a)(5), but reserved any ruling on implied preemption until Proponents produced a Plan that did not depend on the broad express preemption contemplated in the First Amended Reorganization Plan.

On interlocutory appeal on the issue of express preemption, the district court reversed. It held that § 1123(a)(5) expressly preempted nonbankruptcy laws. Relying on *In re Public Service Co. of New Hampshire* v. *New Hampshire* (*In re Public Service Co.*), 108 B.R. 854, 891 (Bankr. D.N.H. 1989), the district court held that all nonbankruptcy laws "otherwise applicable to the 'restructuring transactions necessary to an effective and feasible reorganization' are expressly preempted."

Because we are "in as good a position as the district court to review the findings of the bankruptcy court," we "independently review[ ] the bankruptcy court's decision." *Ragsdale* v. *Haller*, 780 F.2d 794, 795 (9th Cir. 1986). We review the bankruptcy court's conclusion of law de novo. *Id.*

We agree with the district court that a reorganization plan under Chapter 11 of the Bankruptcy Code expressly preempts otherwise applicable nonbankruptcy laws. However, we disagree with the district court as to the scope of that express preemption. We hold that the preemptive scope of a reorganization plan is stated in § 1142(a). That section provides that a plan shall be implemented "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition." That is, under

§ 1142(a), nonbankruptcy law is expressly preempted by a reorganization plan only to the extent that such law "relates to financial condition."

Neither the bankruptcy court nor the district court applied the standard of express preemption contained in § 1142(a). We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

II. Section 1123(a)(5), Section 1142(a), and the "Notwithstanding" Clauses

A. Section 1123(a)(5)

Section 1123(a)(5) has deep roots. In its original form, § 1123(a)(5) was § 77B(b)(9) of the Bankruptcy Act of 1898, added by amendment in 1934. Section 77B(b)(9) provided, in part:

> A plan of reorganization . . . shall provide adequate means for the execution of the plan, which may include the *transfer of all or any part of the property of the debtor to another corporation or to other corporations*, or the consolidation of the properties of the debtor with those of another corporation or corporations, or the retention of the property by the debtor, *the distribution of assets among creditors or any class thereof*, the satisfaction or modification of liens, indentures, or other similar instruments . . . .

Bankruptcy Act of 1898 Amendments, Pub. L. No. 73-296, 48 Stat. 911, 913-14 (1934) (emphasis added). Four years later, § 77B(b)(9) was recodified as § 216(10) and slightly modified to read, in part:

> A plan of reorganization . . . shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; *the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized*; the merger or consolidation of the debtor with one or more other corporations; *the sale of all or any part of*

> *its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein*; the satisfaction or modification or liens; the cancelation or modification of indentures or of other similar instruments . . . .

Bankruptcy Act of 1898 Amendments, Pub. L. No. 75-696, 52 Stat. 840, 895-96 (1938) (emphasis added).

Section 1123(a)(5) is the direct successor to §§ 77B(b) and 216(10). It was originally enacted as part of the Bankruptcy Reform Act of 1978 (now commonly referred to as the Bankruptcy Code). In its original form, as enacted in 1978, § 1123(a)(5) provided, in part:

> (a) A plan shall –
>
> * * *
>
> (5) provide adequate means for the plan's execution, such as –
>
> (A) retention by the debtor of all or any part of the property of the estate;
>
> *(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;*
>
> (C) merger or consolidation of the debtor, with one or more persons;
>
> *(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;*
>
> (E) satisfaction or modification of any lien;
>
> (F) cancellation or modification of any indenture or similar instrument; . . . .

An Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, § 1123, 92 Stat. 2549, 2631-32 (1978) (emphasis added).

The emphases are added to all three statutes to highlight subsections 1123(a)(5)(B) and (5)(D) and their predecessor subsections. Proponents particularly rely on subsections 1123(a)(5)(B) and (5)(D) to support their argument for the preemptive effect of their Plan. These subsections have been largely unchanged since the addition of § 77B(b)(9) to the 1898 Bankruptcy Act by amendment in 1934.

Less than a year after the effective date of the 1978 Bankruptcy Code, the House Judiciary Committee reported favorably on S. 658, a bill that would have made minor amendments to the Code, including to § 1123(a)(5), and whose provisions were later incorporated into S. 863 and passed by the Senate (but not the House) in 1981. S. 658, 96th Cong. (1979); S. 863, 97th Cong. (1981). In the words of the Committee's Report, S. 658 was designed "to correct technical errors, clarify and make minor substantive changes to [the 1978 Code]." Staff of House Comm. on the Judiciary, An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598, H.R. Rep. No. 96-1195, at 1 (1980). The Report summarized as follows the problems S. 658 was designed to address:

> The Bankruptcy Reform Act of 1978 has now been in effect less than one year. It is clear even at this early time in the life of this law that technical amendments are required. Errors in printing, spelling, punctuation, grammar, syntax, and numeration arose in the bill as enacted because of the last-minute process of change through which the bill went when considered at the closing sessions of the 95th Congress.
>
> These same last-minute changes also resulted in the enactment of a bill that contains incongruent provisions; material that was removed from earlier

> versions remained as either cross-references or antecedents for provisions changed or inserted. And, material added often was not completely integrated into the total fabric of the bill as enacted.
>
> Such matters constitute the vast majority of the subject of the Technical Amendments Act. In addition, however, there are several items of a substantial nature which are included because: (1) it was intended that the particular subject was to be dealt with at the earliest possible time after the enactment of the Bankruptcy Reform Act in connection with whatever technical amendments would be considered; (2) further conforming changes were found to be necessary to complete the legislative work intended by the Bankruptcy Reform Act; (3) the treatment of a subject in the Bankruptcy Reform Act was found to be incomplete; or (4) there was overlooked some minor yet relevant matter. *In each case the change proposed is consistent with policies adopted by Congress in its enactment of the Bankruptcy Reform Act.*

Id. at 1-2 (emphasis added).

Among the amendments contained in S. 658 were the following proposed changes to § 1123(a) and (a)(5). First, the phrase "A plan shall" of § 1123(a) would have been amended to read "Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall." Second, the word "execution" of § 1123(a)(5) would have been replaced by "implementation." Senate Bill 658 also would have made several other minor word changes to § 1123. H.R. Rep. No. 96-1195, at 122. The Committee Report described the proposed changes to § 1123 as follows:

> This amendment makes it clear that the rules governing what is to be contained in the reorganization plan are those specified in this

section; deletes a redundant word; and makes several stylistic changes.

Id. at 22.[1] S. 658 was never passed by the Senate.

In 1983, the same proposed amendments to § 1123(a) were passed by the Senate as part of S. 445. S. 445, 98th Cong. (1983). When S. 445 was reported out by the Senate Judiciary Committee, the Committee Report stated that the amendments "make technical stylistic changes." S. Rep. No. 98-65, at 84 (1983). On the floor of the Senate, S. 445 was combined with S. 1013, a bill containing other proposed amendments to the Bankruptcy Code. 129 Cong. Rec. 9968 (1983). The amendments to § 1123 from S. 445 became Subtitle I of S. 1013, entitled "Technical Amendments to Title 11." 129 Cong. Rec. 9986 (1983). Senator Dole, on the Senate floor, described this newly added subtitle as containing provisions designed to "correct grammatical, punctuation, and spelling errors in the code, clarify the intent of the drafters in certain sections, and generally refine procedures." 129 Cong. Rec. 9970 (1983). S. 1013 was passed by the Senate, but not by the House.

The proposed amendments to § 1123 that had been contained in S. 658 in 1980, in S. 863 in 1981, and in S. 445 and S.1013 in 1983, were finally passed by both houses in 1984. No committee reports were prepared, and the amendments were not mentioned on the floors of the two houses. The amendments to § 1123 eventually became law in 1984, and were contained in the conference bill in a subtitle headed "Miscellaneous Amendments to Title 11." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No.

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[1] The numeration in this section of the Committee Report refers, presumably inadvertently, to the numeration of the bill in its incarnation as S. 863, not S. 658. The content of the sections referred to in both bills is identical in all relevant aspects. See H.R. Rep. No. 95-598, at 22; S. 863 § 102(a).

98-353, § 507, 98 Stat. 333, 385 (1984); 130 Cong. Rec. 20217, 20222 (1984).

[1] As a result of the 1984 amendments, § 1123(a)(5) now provides, in the subsections upon which Proponents particularly rely:

> (a) *Notwithstanding any otherwise applicable non-bankruptcy law*, a plan shall –
>
> * * *
>
> (5) provide adequate means for the plan's *implementation*, such as –
>
> * * *
>
> (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
>
> * * *
>
> (D) sale of all or any part of the property of the estate, ...

(Emphasis added.) The italics indicate words added or changed by the 1984 amendment.

B. Section 1142(a)

Section 1142(a) has equally deep roots. The early predecessor to § 1142(a) was § 77B(h), added to the Bankruptcy Act of 1898 by amendment in 1934. That section provided, in relevant part:

> Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge[.]

Bankruptcy Act of 1898 Amendments, Pub. L. No. 73-296, 48 Stat. 911, 920 (1934).

Four years later, § 77B(h) was recodified as § 224(2), which provided:

> Upon confirmation of a plan [ ] the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, *in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation*[.]

Bankruptcy Act of 1898 Amendments, Pub. L. No. 75-696, 52 Stat. 840, 898 (1938) (emphasis added).

[2] Section 1142(a) is the direct successor to §§ 77B(h) and 224(2). Like § 1123(a)(5), it was originally enacted as part of the 1978 Bankruptcy Code. The heading for the whole of § 1142 was "Execution of Plan." Section 1142(a) provides, in its entirety:

> *Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition*, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(Emphasis added.) The italicized clause in § 224(2), requiring, "in the case of a public-utility," the "authorization, approval, or consent" of regulatory commissions, was eliminated in § 1142. The italicized clause in § 1142(a) – the "notwithstanding" clause – was added.

There is little legislative history that provides background for the addition of the clause. Section 1142(a) is mentioned in neither the House nor the Senate Committee Reports. *See* S. Rep. No. 95-989 (1978); H.R. Rep. No. 95-595 (1978). However, Senator DeConcini, in his capacity as the Chair of the Subcommittee on Improvements in Judicial Machinery of

the Senate Judiciary Committee, mentioned both §§ 1123(a) and 1142(a) together, as part of a lengthy statement on the Senate floor, covering twenty-seven pages of the Congressional Record. The totality of what he said concerning either §§ 1123(a) or 1142(a) is as follows:

> Section 1123 of the House amendment represents a compromise between similar provisions in the House bill and Senate amendment. The section has been clarified to clearly indicate that both secured and unsecured claims, or either of them, may be impaired in a case under title 11. Moreover, section 1123(a)(1) has been substantively modified to permit classification of certain kinds of priority claims. This is important for purposes of confirmation under section 1129(a)(9).
>
> Section 1123(a)(5) of the House amendment is derived from a similar provision in the House bill and Senate amendment but deletes the language pertaining to "fair upset price" as an unnecessary restriction.[2] Section 1123 is also intended to indicate that a plan may provide for any action specified in section 1123 in the case of a corporation without a resolution of the board of directors. If the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable nonbankruptcy law in accordance with section 1142(a) of title 11.

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[2] The Norton bankruptcy treatise indicates that in referring to § 1123(a)(5) Senator DeConcini was actually referring to what became § 1123(a)(6) in the enacted statute. This is incorrect. Senator DeConcini was, in fact, referring to what became § 1123(a)(5), for the "fair upset price" language, which Senator DeConcini says was deleted as unnecessary, was in § 216(10), the immediate predecessor to § 1123(a)(5). Section 1123(a)(6) was entirely new. *See* 8 William L. Norton, Norton Bankruptcy Law and Practice 2d 1119 (2002).

124 Cong. Rec. 34005 (1978).

Section 1142(a) was not substantially changed by the amendments to the Bankruptcy Code enacted in 1984. The amendment eliminated a comma that had followed the phrase "carry out the plan." It also changed the heading for § 1142 from "*Execution* of the Plan" to "*Implementation* of the Plan." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 387 (1984). This change matched the 1984 amendment of § 1123(a)(5), which changed "adequate means for the plan's *execution*" to "adequate means for the plan's *implementation*."

C. Proponents' Reading of Section 1123(a)(5) as Independent from Section 1142(a)

Proponents ask us to hold that provisions of PG&E's Reorganization Plan drafted pursuant § 1123(a)(5) – in particular, subsections (a)(5)(B) and (a)(5)(D) – broadly preempt otherwise applicable nonbankruptcy laws with which the Plan conflicts. They ask us, in order to reach that holding, to read the "notwithstanding" clause of § 1123(a)(5) independently from, and more broadly than, the "notwithstanding" clause of § 1142(a). For the reasons that follow, we do not agree that these two clauses can be read independently. Rather, we hold that the clauses must be read together, and that the express preemption of § 1123(a)(5) is limited to otherwise applicable nonbankruptcy laws "relating to financial condition," as specified in § 1142(a).

Proponents also ask that we hold provisions of the Plan broadly preempt conflicting California law because they argue that Congress intended preemption specifically with respect to reorganization plans of public utilities. They urge that we find evidence for this intention in § 1142(a)'s 1978 codification and the failure to reenact predecessor § 224(2)'s language requiring the approval of relevant regulatory commissions when a public utility files for bankruptcy. The elimination of this language in enacting § 1142(a), however, cannot be construed as evidence of a broad Congressional

intent to preempt the state regulatory laws, even with respect to public utilities. Section 1142(a), unlike its predecessor § 224(2), does not refer to public utilities in any way. A requirement that once existed for public utilities is gone. Section 1142(a), in its current form, simply does not distinguish between public utilities and other debtors.

III. Relevant Principles of Statutory Construction

[3] The centerpiece of any preemption analysis is congressional purpose. "The purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n* v. *Schermerhorn*, 375 U.S. 96, 103. After quoting this "oft-repeated comment" from *Schermerhorn*, the Supreme Court recently wrote, "as a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996) (citation omitted) (italics in original). To determine congressional purpose, "we look to the statute's language, structure, subject matter, context, and history – factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998); *see also Medtronic*, 518 U.S. at 486 ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. Also relevant, however, is the 'structure and purpose of the statute as a whole[.]'") (internal citations omitted).

Two presumptions assist us in determining Congressional purpose in this case. The first is a general presumption, applicable in all preemption cases. The second is a presumption specific to cases decided under the Bankruptcy Code.

[4] First, we presume that Congress does not undertake lightly to preempt state law, particularly in areas of traditional state regulation.

> [B]ecause the States are independent sovereigns in our federal system, we have long presumed that

> Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.'

Medtronic, 518 U.S. at 485 (internal citation omitted). As the Court stated in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992), in refusing to find state tort damage actions preempted by a federal cigarette labeling and advertising requirement, "we must construe these provisions [of federal law] in light of the presumption against the pre-emption of state police power regulations."

Even though bankruptcy is one of only two federal legislative powers in Article I, Section 8 of the Constitution in which the power to make "uniform" laws is made explicit, the presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), the question addressed was whether bankruptcy law displaced state environmental law. The Court emphasized that if Congress wished to grant an exemption from otherwise applicable nonbankruptcy state law, "'the intention would be clearly expressed.'" *Id.* at 501 (citation omitted). Similarly, in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), the Court refused to construe bankruptcy law so as to interfere with the operation of a foreclosure sale conducted under state law. "To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'" *Id.* at 544 (citation omitted).

[5] Second, we presume, absent clear indications to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting the Bankruptcy Code

in 1978 or in amending it in 1984. The Supreme Court, in a remarkably consistent series of cases, has explicitly and repeatedly relied on this presumption. The first case is a bankruptcy preemption case; the others are straight bankruptcy cases.

In *Midlantic*, the question addressed was whether, under 11 U.S.C. § 554(a), a bankruptcy trustee could abandon burdensome real property and thereby entirely preempt state-law obligations – such as required environmental clean-up – attached to that property. Section 554(a) was enacted as part of the 1978 Code and was amended slightly in 1984. Prior to the adoption of § 554(a), a trustee could not entirely escape state-law obligations by abandoning property. However, § 554(a) explicitly authorized abandonment by the trustee and did not mention any state-law limitation on abandonment. The Court rejected an argument by the trustee that § 554(a) evidenced a Congressional purpose to depart from prior bankruptcy practice and entirely to preempt state environmental law obligations:

> If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."
>
> * * *
>
> Neither the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety.

474 U.S. at 501-02 (citation omitted).

In *Kelly* v. *Robinson*, 479 U.S. 36 (1986), the question addressed was whether 11 U.S.C. § 523(a)(7), again enacted as part of the 1978 Code, excepted from discharge a restitution order in a state criminal case in a Chapter 7 bankruptcy. Under pre-Code law, there was no such

exception, despite statutory language arguably to the contrary. "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders[.]" *Id.* at 46. As an aid to construction, the Court quoted from *Midlantic*:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.*

Id. at 47 (quoting *Midlantic*, 474 U.S. at 501) (emphasis added). Relying in part on the "absence of any significant evidence that Congress intended to change the law," *id.* at 53, the Court declined to interpret § 523(a)(7) as a departure from pre-Code law:

> In light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress.

Id.

In *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), the question addressed was whether another provision enacted as part of the 1978 Code, 11 U.S.C. § 362(d)(1), allowed compensation to undersecured creditors for delays in foreclosing on their collateral that resulted from the operation of the automatic stay. Under pre-Code law, such compensation was not available. As part of its analysis, the Court relied on the lack of any specific provision in the statute and any indication in the legislative history that Congress intended to depart from the prior law:

> Such a major change in the existing rules would not likely have been made without specific provision in

> the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history.

Id. at 380 (internal citation omitted).

In *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), the question addressed was whether 11 U.S.C. § 506(d), enacted as part of the 1978 Code, allowed a debtor to "strip down" a creditor's lien on the value of real property. Under pre-Code law, stripping down was not allowed. Because § 506(d) was ambiguous, and because there was no indication in the legislative history that a major change was intended, the Court refused to interpret § 506(d) to change the prior law:

> [G]iven the ambiguity in the text [of § 506(d)], we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.
>
> * * *
>
> When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.

Id. at 417, 419 (internal citation omitted).

Finally, in *Cohen* v. *de la Cruz*, 523 U.S. 213 (1998), the question addressed was whether 11 U.S.C. § 523(a)(2)(A) excepts from discharge a treble damage award obtained in a suit based on the debtor's fraud. Section 523(a)(2)(A) was enacted as part of the 1978 Code, and was amended in 1984. As enacted in 1978, § 523(a)(2)(A) read:

> (a) A discharge . . . does not discharge an individual debtor from any debt—
>
> . . .

> (2) for obtaining money, property, services, or . . . credit, by—
>
> > (A) false pretenses, a false representation, or actual fraud[.]

(Emphasis added.) After the 1984 amendment, § 523(a)(2)(A) read:

> (a) A discharge . . . does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or . . . credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud[.]

(Emphasis added.) The debtor argued that the phrase "to the extent obtained by," added by the 1984 amendment, meant that the non-dischargeable portion of his fraud-related debt was limited to amounts obtained by the fraud itself, and did not extend to a treble damage award based on the fraud. Considered solely as a textual matter, divorced from context and history, the debtor's argument was a very plausible interpretation of amended § 523(a)(2)(A).

The Court nonetheless rejected the debtor's argument. It noted that the pre-Code version of the fraud exception to non-dischargeability contained no exclusion for treble damage awards, and that § 523(a)(2)(A), as it was enacted in 1978, also contained no such exclusion. The debtor's argument depended entirely on Congress's addition in 1984 of the phrase "to the extent obtained by," which the legislative history had characterized only as a "stylistic change." The Court held that this was not enough:

> As the result of a slight amendment to the language in 1984, referred to in the legislative history only as a "stylistic change," § 523 (a)(2)(A) now excepts from discharge "any debt . . . for money, property, services, or . . . credit, to the extent obtained by . . . false pretenses, a false representation, or actual

> fraud." We, however, "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," and the change to the language of § 523(a)(2)(A) in 1984 in no way signals an intention to narrow the established scope of the fraud exception along the lines suggested by petitioner. If, as petitioner contends, Congress wished to limit the exception . . ., one would expect Congress to have made unmistakably clear its intent[.]

Id. at 221-22 (citations omitted).

IV. Express Preemption under Section 1123(a)(5) and 1142(a)

[6] The phrase "notwithstanding any otherwise applicable nonbankruptcy law" in § 1123(a) indicates that Congress intended that there be express preemption under § 1123(a). The "notwithstanding" formulation is commonly used in other parts of the Bankruptcy Code to indicate express preemption, and there is little reason to think that it is used in § 1123(a) to indicate anything else. *See*, *e.g.*, 11 U.S.C. § 363(b)(2)(A) ("notwithstanding subsection (a) of [section 7A of the Clayton Act]") and (b)(2)(B) ("notwithstanding subsection (b) of [section 7A of the Clayton Act]"); § 365(e)(1) ("Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified[.]"), (f)(1) "not-withstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law"), and (f)(3) ("Notwithstanding a provision in . . . applicable law that terminates or modifies . . . such contract or lease . . . ."); § 1124(2) ("notwithstanding any . . . applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment"); § 1142(a) ("Notwithstanding any otherwise applicable nonbankruptcy law, rule or regulation relating to financial condition . . . ."). The issue is thus not whether there is

express preemption under § 1123(a), but rather its extent. As the Court phrased it in *Medtronic*, our task is to determine the "scope of the statute's pre-emption." 518 U.S. at 485.

Section 1123(a) specifies, in seven subsections, what a reorganization plan in a Chapter 11 bankruptcy *must* do. (Section 1123(b), which is not before us, specifies what such a plan *may* do.) Subsection 1 requires a plan to designate classes of claims. Subsection 2 requires a plan to specify any class of claims or interests that is not impaired under the plan. Subsection 3 requires that the plan specify the treatment of any impaired class of claims or interests. Subsection 4 requires that the plan provide for the same treatment of claims or interests within a particular class, unless a holder of a particular claim or interest agrees otherwise. Subsection 5, at issue in this case, requires that the plan "provide adequate means for the plan's implementation." Subsection 6 requires that the plan provide for inclusion in a debtor corporation's charter provisions that prohibit the issuance of nonvoting securities and that provide for "appropriate distribution" of voting interests among classes of securities. Finally, subsection 7 requires that the plan contain only provisions that are consistent with the interests of creditors and equity security holders, and with public policy with respect to selection of officers, directors and trustees.

[7] Sections 1123(a) and 1142(a) were enacted at the same time, as part of the 1978 Bankruptcy Code. Both sections are directly concerned with the contents and implementation of a reorganization plan under Chapter 11. Section 1123(a) specifies what a confirmable plan must do. Among other things, under § 1123(a)(5) it must "provide for adequate means for the plan's implementation." Section 1142(a) in turn describes the duty of an entity charged with implementing a confirmed plan. As enacted in 1978, § 1142(a) contained an express preemption clause providing that those charged with implementing a confirmed plan could perform that duty "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial

condition." As enacted in 1978, § 1123(a) contained no such clause.

[8] When the 1984 amendments to the Bankruptcy Code were adopted, there was absolutely no indication that those amendments were intended by Congress to make any important changes to the 1978 Code. As stated generally by the House Judiciary Committee Report prepared in 1980, in connection with what eventually became the 1984 amendments, "In each case the change proposed is consistent with policies adopted by Congress in its enactment of the Bankruptcy Reform Act [of 1978]." House Comm. on the Judiciary, An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598, H.R. Rep. No. 96-1195, at 1 (1980). The Committee Report stated specifically with respect to the proposed amendment of § 1123(a), "the amendment makes it clear that the rules governing what is to be contained in the reorganization are those specified in this section; deletes a redundant word; and makes several stylistic changes." *Id.* at 22. True to the title it appeared under in 1983, the 1984 amendment to § 1123(a) was purely "technical." Subtitle I – Technical Amendments to Title 11, S. 1013, 129 Cong. Rec. 9986 (1983).

[9] It is thus clear that the addition of the "notwithstanding" clause by amendment in 1984 was not intended by Congress to make any substantial change to the 1978 Code. In particular, it is clear that the "notwithstanding" clause of § 1123(a) was not intended to change the express preemptive effect of a confirmable reorganization plan. The 1978 Code had already indicated in § 1142(a) the express preemptive effect of a confirmed reorganization plan: The plan is to be implemented "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition." As we read the 1984 amendment to § 1123(a), the newly added "notwithstanding" clause was intended to be coextensive with the already-existing "notwithstanding" clause of § 1142(a).

Our conclusion is based not only on the presumption that Congress would not have made an important change in the Code without clearly indicating its intent to do so. *See*, *e.g.*, *Midlantic*; *de la Cruz*. Our conclusion is also based on the overall structure of the Code. It makes perfect sense that the express preemptive scope of what must be included in a confirmable plan, specified in § 1123(a), would be the same as the express preemptive scope of what is actually included in a confirmed plan, specified in § 1142(a). It also makes perfect sense that the express preemptive scope of what must be in a confirmable and confirmed plan would be laws "relating to financial condition."

Our conclusion is reinforced by the legislative history and actual language of §§ 1123(a) and 1142(a) in the 1978 Act and 1984 amendments. In his floor statement leading up to the adoption of the 1978 Act, Senator DeConcini explicitly linked the prescribed contents of a confirmable plan under § 1123(a) and the preemptive effect of a confirmed plan under § 1142(a). Senator DeConcini nowhere in his lengthy statement discussed §§ 1123(a) and 1142(a) independently from one another. Two years later, in 1980, the House Committee Report stated that proposed legislation, which was eventually enacted as the 1984 amendment to § 1123(a), "makes clear that the rules governing what is to be contained in the reorganization plan are those specified in this section." That is, the addition of the "notwithstanding" clause to § 1123(a) made clear that the rules governing what must be in a confirmable plan are contained in § 1123(a) and not in otherwise applicable nonbankruptcy laws. That is, a plan proposed in conformity with § 1123(a) could be confirmed, and a confirmed plan would then have the preemptive effect precisely specified in § 1142(a).

Further, the phrase "adequate means for the plan's *execution*" used in the 1978 text of § 1123(a) was changed to "adequate means for the plan's *implementation*" by the 1984 amendment. At the same time, in a parallel change of wording in § 1142(a), the heading "*Execution* of the Plan" used as the

heading for the 1978 text of § 1142(a) was changed to "*Implementation* of the Plan" by the 1984 amendment. We regard these parallel word changes in §§ 1123(a) and 1142(a) as additional evidence that Congress had both of these sections in mind during the 1984 amending process, and that it intended that the two sections be read in a parallel or complementary manner.

We therefore conclude that the "notwithstanding" clause of § 1123(a) expressly preempts otherwise applicable nonbankruptcy law, and that the scope of that express preemption is the same as under the "notwithstanding" clause of § 1142(a). Otherwise applicable nonbankruptcy laws "relating to financial condition" are expressly preempted under both §§ 1123(a) and 1142(a). The bankruptcy court did not apply this express preemption standard to Proponents' Plan. We believe that it is most appropriate for that court to apply that standard in the first instance. We therefore remand for that determination.

V. Implied Preemption

Express and implied preemption under the Bankruptcy Code are two distinct concepts. The bankruptcy court did not reach the question of implied preemption under § 1123(a), and that question is not before us in this interlocutory appeal. It is possible for there to be no express preemption under a particular provision of the Bankruptcy Code, but nonetheless to be implied preemption under the Code. In *Midlantic*, for example, the Supreme Court held that there was no express preemption of state environmental law under 11 U.S.C. § 554, but did not reach the question "whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself[.]" 474 U.S. at 507. Similarly, in *Baker & Drake, Inc.* v. *PSC of Nevada* (*In re Baker & Drake, Inc.*), 35 F.3d 1348 (9th Cir. 1994), we analyzed a confirmed plan under an implied preemption analysis, stating the test as whether "state law 'stands as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress.'" *Id.* at 1353 (citations omitted). The bankruptcy court did not reach the question of implied preemption, and that question is not before us in this interlocutory appeal.

VI. Conclusion

[10] We hold that the scope of preemption under the "notwithstanding" clause of § 1123(a) is the same as under the "notwithstanding" clause of § 1142(a), and that otherwise applicable nonbankruptcy laws "relating to financial condition" are expressly preempted under both §§ 1123(a) and 1142(a). Neither the bankruptcy court nor the district court used the express preemption standard stated in the "notwithstanding" clause of § 1142(a) and referred to in the "notwithstanding" clause of § 1123(a). We reverse the decision of the district court. We remand to the bankruptcy court for a determination of whether the laws Proponents propose to preempt in their Plan come within the express preemption of §§ 1123(a) and 1142(a). The question of implied preemption will also be before the bankruptcy court on remand.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C-02-1550 VRW, (Bankruptcy Case No 01-30923 DM), Chapter 11 Case

IN RE: PACIFIC GAS and ELECTRIC CO, Appellant, Cross-Appellee, Debtor and Debtor in Possession; Federal ID No 94-0742640

August 30, 2002, Decided

ORDER

PG&E appeals from a March 18, 2002, order of the bankruptcy court, entitled "Order and Judgment Disapproving Disclosure Statement; Rule 54(b) Certification" (bankruptcy order), which embodies a ruling issued on February 7, 2002, entitled "Memorandum Decision Regarding Preemption and Sovereign Immunity" (bankruptcy decision). Doc #1. On June 24, 2002, the court denied a motion to dismiss PG&E's appeal filed by The People of the State of California, the California Public Utilities Commission (CPUC) and the City and County of San Francisco (collectively, objectors). Doc #68. The court determined that the bankruptcy court's FRCP 54(b) certification was proper and, consequently, that appellate jurisdiction exists as of right, pursuant to 28 USC § 158(a)(1). In the alternative, the court granted PG&E's "protective" motion for leave to file an interlocutory appeal, pursuant to section 158(a)(3), determining that in the event the bankruptcy court's FRCP 54(b) certification was not proper, the court would still exercise its discretion to hear this appeal.

This appeal poses a discrete question of statutory interpretation of tremendous importance to one of the largest bankruptcies in United States history.

I.

This matter, like many others currently in federal court and in this district, including an action filed by PG&E against the CPUC, is tied to California's attempt to restructure its regulatory scheme for the generation and sale of electricity. In *PG&E* v. *Lynch*, 01-3023-VRW, 2002 U.S. Dist. LEXIS 13895 (July 25, 2002), the undersigned discussed at length California's statutory scheme implementing this restructuring, the energy crisis beginning in the summer of 2000 and the resulting effects on PG&E. The court will not repeat this discussion here, although it provides the backdrop for PG&E's bankruptcy and the instant appeal.

On April 6, 2001, claiming that the combination of the energy crisis and the retail rate freeze enacted as part of California's restructuring scheme had ruined its credit rating and led to "billions of dollars in defaulted debt and unpaid bills," PG&E Br (Doc #14) at 5, PG&E filed a voluntary petition under chapter 11 of title 11 of the United States Code (bankruptcy code) in the United States Bankruptcy Court for the Northern District of California. On December 19, 2001, PG&E and its parent company filed their first amended plan (December plan) of reorganization and their first amended disclosure statement. *See* ER at 153, 207.

Central to the December plan is the disaggregation of PG&E, which involves the creation of three new limited liability companies and the separation of PG&E's operations into four lines of business, reflecting PG&E's historical functions: retail gas and electric distribution; electric transmission; interstate gas transmission and electric generation. As a result of the reorganization contemplated by the plan, four companies, all subsidiaries of PG&E's parent company, would emerge from bankruptcy: ETrans, containing PG&E's electric transmission assets; GTrans, PG&E's gas transmission assets; Electric Generation (Gen), PG&E's generation assets; and the Reorganized PG&E, which would continue in the retail sale and distribution of electricity and

gas. According to PG&E, the entities involved in electric transmission, interstate gas transmission and electric generation will no longer be subject to the regulatory jurisdiction of the CPUC after reorganization, but will be under the exclusive ratemaking jurisdiction of the Federal Energy Regulatory Jurisdiction (FERC). The Reorganized PG&E would remain under the CPUC's regulatory jurisdiction, subject, however, to the limits imposed upon that jurisdiction by federal law. *See PG&E* v. *Lynch*, 01-3023-VRW, 2002 U.S. Dist. LEXIS 13895.

Absent preemption, state law poses a formidable obstacle to the execution of several of the central transactions required to carry out the plan. For example, a critical feature of the plan is the transfer of PG&E's retained generation to the new limited liability company, Gen. According to the CPUC, however, such a transfer of generation assets would be illegal under California Public Utilities Code § 377, enacted in January 2001, which prohibits an owner of electric generation facilities from disposing of any such facilities until January 1, 2006. The CPUC also contends that several of the critical transactions proposed in the plan require state regulatory review and approval under state health, safety, welfare and environmental statutes, including the California Environmental Quality Act (CEQA). Under California Public Utilities Code § 851, for example, PG&E would ordinarily be required to obtain state approval to sell, lease or spin off its utility facilities. According to the CPUC, an application for such approval requires an environmental review under CEQA.

As noted in this court's June 24 order, the CPUC objected to PG&E's disclosure statement in the proceedings below. The CPUC asserted that the proposed reorganization (1) impermissibly sought to preempt state and federal law not subject to preemption and (2) sought declaratory and injunctive relief against California in violation of principles of sovereign immunity. In response to the former objection (the latter is not at issue in this appeal), PG&E asserted that all

state--and most if not all other non-bankruptcy--laws are expressly preempted by § 1123(a)(5) of the bankruptcy code insofar as they purport to prohibit, veto or nullify transactions necessary to implement the restructuring proposed in the plan. Pursuant to § 1123(a)(5), PG&E asserted that a confirmation order approving its plan and authorizing the transactions contemplated by the plan would:

> preempt "otherwise applicable nonbankruptcy law" in the following areas: (1) any approval or authorization of the CPUC or compliance with the California Public Utilities Code or CPUC rules, regulations or decisions otherwise required to transfer public utility property (including authorizations to construct facilities), issue securities and implement the Plan; and (2) the exercise of discretion by any other state or local agency or subdivision to deny the transfer or assignment of any of the Debtor's property, including existing permits or licenses, or the issuance of identical permits and licenses on the same terms and conditions as the Debtor's existing permits and licenses where both the Reorganized Debtor and one or more of ETrans, GTrans and Gen requires such permit or license for their post Effective Date operations.

First Am Disc Statement (ER 346).

Notably, PG&E contends that the preemption authorized by § 1123(a) occurs "at the time the Plan is implemented." *Id.* In other words, PG&E does not contend that its reorganization plan has the effect of preempting application of nonbankruptcy law that would apply to the reorganized PG&E and the new entities after reorganization. Rather, PG&E explicitly concedes that the four companies emerging from bankruptcy will be subject to all applicable state and federal law on a going-forward basis. Moreover, PG&E states that it intends to follow "the established procedures for the transfer of most permits and licenses," as many of these

procedures are "ministerial or governed by objective criteria that make it unlikely that the agency or subdivision could act or fail to act in a way that would interfere with consummation of the Plan." *Id.* PG&E seeks to be free only from nonbankruptcy requirements that threaten the reorganization provided for in the plan. To be sure, PG&E's concern that, absent some form of preemption, state actors such as the CPUC could exercise a veto over PG&E's proposed reorganization is not without basis. Throughout its brief filed in this matter, the CPUC makes clear its displeasure not just with PG&E's attempt to evade state regulatory processes, but with the goal PG&E is pursuing and, in particular, the transfer of regulatory control from the state to FERC over several of PG&E's lines of business. According to the CPUC this is not a desirable outcome, as "federal regulation is not an adequate substitute for state regulation on many practical levels." CPUC Br (Doc #78) at 13.

On February 7, 2002, the bankruptcy court issued its memorandum decision regarding preemption and sovereign immunity, rejecting PG&E's "across-the-board, take-no-prisoners" claim that § 1123(a)(5) allows it to "disaggregate with unfettered preemption of any contrary nonbankruptcy law." Bankr Dec (ER 863) at 46, 40. In a lengthy decision, the bankruptcy court rejected

> the notion that Congress, without a hint in the legislative history in a section of the Bankruptcy Code entitled "Contents of Plan," and using words calling for "adequate means for the Plan's implementation," intended to permit a debtor's plan--confirmed by a bankruptcy judge (not by legislative act, as in most preemption situations)--to obliterate a whole area of jurisdiction and authority traditionally left to state law.

Id. at 22-23.

Although rejecting PG&E's claim that nonbankruptcy laws otherwise applicable to the restructuring transactions

proposed in the plan were expressly preempted by the bankruptcy code, the bankruptcy court did not, however, finally determine that state laws operating as impediments to PG&E's proposed reorganization could not be preempted under principles of implied preemption. Indeed, the bankruptcy court expressed its "belief that the Plan could be confirmed if Proponents are able to establish with particularity the requisite elements of implied preemption;" and noted that "if the Disclosure Statement is amended consistent with this Memorandum Decision, the court will approve it and let the Proponents test preemption at confirmation. " *Id.* at 3. The bankruptcy court directed PG&E to identify, as part of its attempt to show implied preemption, the laws it wished to preempt and "to state in summary fashion" why the laws should be preempted. *Id.* at 40.

Recognizing the centrality of the issue it decided, the bankruptcy court certified its decision for immediate appeal, pursuant to FRCP 54(b), made applicable to bankruptcy proceedings by Fed R Bankr P 7054(a) and Fed R Bankr P 9014:

> This is a Chapter 11 case of enormous significance to thousands of creditors owed billions of dollars. It is clearly one of the largest bankruptcies in United States history, and definitely the largest involving a public utility. An attempt by a utility to free itself from state regulation to the extent contemplated by the Plan is virtually without precedent. Further, PG&E expects to pay creditors in full with interest, but already this case is nearly a year old and further delay should be avoided. Creditors have a real economic interest in a speedy resolution of this case. If a court on appeal believes that express preemption is available here, the rule of law should be settled forthwith.

Bankr Order (ER 924) at 5-6.

As noted, this court determined that certification was proper. The bankruptcy court's judgment is, therefore, properly before the court, pursuant to 28 USC § 158(a)(1). This appeal poses essentially a single question of statutory interpretation. The bankruptcy court's interpretation of the bankruptcy code is reviewed de novo. *See, e.g., Tighe* v. *Celebrity Home Entm't, Inc*, 210 F.3d 995, 997 (9th Cir 2000).

II.

A.

In relevant part, § 1123(a) provides:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
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> * * *
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> (5) provide adequate means for the plan's implementation, such as—
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> * * *
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> (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

The court first notes that, although it may sometimes seem so from the parties' briefs and the oral arguments at the hearing on this appeal, this is not a matter of deciding whether § 1123(a) expressly preempts some nonbankruptcy law or impliedly preempts some bankruptcy law. There is, in fact, no question that § 1123 expressly preempts some nonbankruptcy law – both parties agree that the "notwithstanding" phrase has some express preemptive meaning – the dispute is over which laws are preempted and in what context. With respect to this dispute, the parties' interpretation of the statutory section differ widely.

The CPUC contends, and the bankruptcy court essentially agreed, that § 1123 is merely a "directive" statute, specifying in subsection (a) thereof what must be put in a reorganization plan and in subsection (b) what may be put in

a reorganization plan. The purpose of the section is to require "that adequate information be provided that would enable a hypothetical investor typical of holders or claims or interests of a relevant class to make an informed judgment about the plan." Bankr Dec at 22. Under this interpretation, the central phrase in dispute, "notwithstanding any otherwise applicable nonbankruptcy law," merely clarifies that "the debtor's obligation to set forth adequate means for the plan's implementation in the proposed plan may not be altered or varied by any nonbankruptcy law." CPUC Br (Doc #78) at 20. This phrase then is rather innocuous, adding little to the provisions of the section. Indeed, notwithstanding its apparent application to all paragraphs in subsection (a), the CPUC is not completely convinced that "the 'notwithstanding' phrase * * * applies to section 1123(a)(5) at all." *Id.*

PG&E contends, by contrast, that § 1123 does not merely clarify what must and may go into a plan, but substantively empowers debtors to engage in certain actions unfettered by otherwise applicable nonbankruptcy laws, including all the means by which the plan may be implemented specified in § 1123(a)(5). In short, § 1123(a)(5) preempts all nonbankruptcy laws "that are obstacles to the transactions and steps necessary to effect a reorganization plan." PG&E Br (Doc #14) at 3. Under this interpretation, state laws and regulators may not stand as an impediment to the restructuring provisions of a chapter 11 plan of reorganization, although these laws will again apply to the reorganized debtor and any new entities created pursuant to the plan.

The California Hydropower Reform Coalition (CHRC) and the United States Environmental Protection Agency (EPA) have both weighed in on the subject. *See* Docs ##70 and 74. The CHRC essentially mimics the CPUC's position. The EPA, although noting that PG&E has "stated that [it] intend[s] to comply with all federal regulatory laws and obtain all federal approvals necessary to implement its proposed plan," asserts that, in its view, PG&E's

interpretation of the preemptive effect of § 1123(a) is too broad.

PG&E is, however, indeed correct that its interpretation of § 1123(a) is consistent with that of every court to address the issue, except, of course, the bankruptcy court below. After careful consideration, the court is convinced that the bankruptcy court's determination that § 1123(a) merely directs the debtor to place certain items in its reorganization plan is erroneous. Rather, a review of the text and legislative history of this section demonstrates that Congress intended expressly to preempt nonbankruptcy laws that would otherwise apply to bar, among other things, transactions necessary to implement the reorganization plan.

B.

The CPUC contends that, in interpreting § 1123(a), the court should apply the so-called "presumption against preemption" and that this presumption operates in favor of the CPUC's proposed interpretation. In support of this argument, the CPUC centrally relies on *Medtronic, Inc* v. *Lohr*, 518 U.S. 470 (1996), in which the Supreme Court discussed the proper approach to "interpreting a statutory provision that expressly pre-empts state law." *Id.* at 484. The Court noted that interpretation of express preemption language "does not occur in a contextual vacuum," but is rather informed by "two presumptions about the nature of pre-emption." *Id.* at 485.

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated * * * in a field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act

> unless that was the clear and manifest purpose of Congress." *Ibid.*; [further citations omitted].
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> * * *
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> Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), that "the purpose of Congress is the ultimate touch-stone" in every pre-emption case.

518 U.S. 470, 485-486.

The two presumptions about the nature of preemption identified by the Court in *Medtronic* are often collapsed into one "presumption against preemption," which essentially stands for the proposition that state police powers are generally presumed not to be superseded absent indication that such preemption was the "clear and manifest purpose of Congress." *See, e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

The application of this presumption against preemption was recently discussed by the Supreme Court in *New York* v. *FERC*, 535 U.S. 1 (2002):

> Pre-emption of state law by federal law can raise two quite different legal questions. The Court has most often stated a "presumption against pre-emption" when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority. *See, e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (citing cases); *see also Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). In such a situation, the Court "'starts with the assumption that the historic police powers of the States were not to be superseded * * * unless that was the clear and

> manifest purpose of Congress.'" *Hillsborough County*, 471 U.S. at 715 (quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). These are not such cases, however, because the question presented does not concern the validity of a conflicting state law or regulation.

122 S. Ct. 1012, at 1023.

As noted by the Court in *New York* v. *FERC*, the presumption against preemption is commonly applied in order to determine whether particular state laws are either expressly preempted by a federal statute or impliedly preempted by federal regulation in a given field. The question of the validity of a particular state law in light of express or implied preemption by Congress, however, is not the question posed by the instant appeal. Rather to resolve this appeal the court must choose between two radically different arguments about what sort of laws Congress meant expressly to preempt. This determination cannot be made based on a presumption, but must be made in terms of ordinary principles of statutory construction. Once this choice is made, and the "purpose of Congress," *Medtronic*, 518 U.S. at 486, is clarified, then the presumption against preemption may become relevant—although this is somewhat doubtful given the seemingly broad reach of the "notwithstanding" phrase—in order to determine whether a particular state law is preempted. But to apply the presumption against preemption to determine Congress' intent would be to place the cart before the horse.

Rather than beginning with a presumption, therefore, as an initial matter at least, the court must look to the plain language of the statute. *See, e.g.*, *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986).

C.

As noted, every court except the bankruptcy court below to have considered § 1123(a)(5) has concluded that this section contains an express preemption of nonbankruptcy laws that would otherwise apply to the restructuring

transactions provided for in a reorganization plan. The case law on this subject is, however, rather limited. By far, the court to have considered this matter in the most depth is the United States Bankruptcy Court for the District of New Hampshire in *Public Service Company of New Hampshire* v. *New Hampshire* (*In re Public Serv Co*), 108 B.R. 854 (D NH 1989). After conducting a quite helpful and thorough analysis of the (again rather limited) legislative history of § 1123(a), the New Hampshire bankruptcy court concluded that the meaning of § 1123(a)(5) is clear:

> With regard to the present statutory provision before the court, i.e. § 1123(a)(5) providing that "notwithstanding any otherwise applicable nonbankruptcy law" a plan of reorganization "shall" contain adequate provisions for the plan's implementation, in terms of the necessary restructuring of the debtor and its assets and liabilities common to all plans of reorganization in complex cases, the statute would seem to be plain on its face to indicate an express preemptive intent as to such restructuring provisions of a chapter 11 plan of reorganization.

Id. at 882.

Indeed, to the New Hampshire bankruptcy court, the conclusion "seems obvious" that § 1123(a)(5):

> on its face contemplates that restructuring transactions necessary to a plan of reorganization may be provided notwithstanding nonbankruptcy law, and that upon confirmation of the plan pursuant to § 1129(a) of the Bankruptcy Code the confirmed plan—and the reorganized debtor created thereby—will be governed by those provisions.

Id.

Besides its thorough consideration of the precise question posed in the instant appeal, *In re Public Serv. Co.* is particularly interesting because it is quite factually similar to

the situation here. That case too involved an electric utility debtor in reorganization, seeking to create new limited liability companies, some of which would no longer be under state regulatory control after reorganization, but would be under the jurisdiction of FERC. Similarly, the state commission in that case argued that its approval of the restructuring transactions was required by state law and the utility resisted submitting to this approval.

The New Hampshire bankruptcy court noted that its interpretation of the preemptive force of § 1123(a)(5) was also reached by the Fourth Circuit in *Universal Cooperatives, Inc.* v. *FCX, Inc.*, 853 F.2d 1149 (4th Cir 1988). In *FCX*, appellee Universal challenged an order of the bankruptcy court, affirmed by the district court on appeal, which, pursuant to § 1123(a)(5)(D), authorized FCX to release collateral securing its indebtedness to Universal in satisfaction of Universal's claim, in a manner that violated Universal's bylaws. Section 1123(a)(5)(D) provides that, "(a) notwithstanding any otherwise applicable nonbankruptcy law, a plan shall— * * * (5) provide adequate means for the plan's implementation, such as— * * * (D) sale of all or any part of the property of the estate either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate." Universal, to which FCX was in debt, had previously issued to FCX "patronage certificates" which were redeemable by Universal at the discretion of Universal's board of directors. FCX desired to offset Universal's claim by the release of the patronage certificates and contended that § 1123(a)(5)(D) preempted any restrictions in Universal's bylaws applying to such a release. The Fourth Circuit reasoned:

> Because "Congress may * * * abrogate state law entitlements in bankruptcy pursuant to its Bankruptcy Clause Power, US Const, art I, § 8, cl 4," *In re Farmers Markets*, 792 F.2d 1400, 1403 (9th Cir 1986), we must ask further whether there exists any

> conflicting bankruptcy law which overrides the discretionary power over the redemption of the patronage certificates vested in Universal's board by state law and its by-laws. FCX here contends that § 1123(a)(5)(D) preempts the restrictive provisions of Universal's by-laws and allows it to release the patronage certificates in satisfaction of Universal's claim.
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> * * *
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> In 1984, the opening clause of § 1123(a) was amended to read: "Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall * * *." By its plain language then, § 1123(a)(5)(D) overrides nonbankruptcy law restrictions on the distribution of collateral to satisfy a claim secured by the same. Accordingly, § 1123(a)(5)(D) supersedes the discretionary power over surrender of the patronage certificates bestowed on Universal's board by its by-laws.

853 F.2d 1149, 1154.

In the Ninth Circuit, too, the only case to address the issue reached a similar conclusion of the preemptive effect of § 1123(a)(5). In *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338 (9th Cir 1988), the Ninth Circuit considered § 1123(a)(5)(G), which as an example of "adequate means for the plans implementation," specifies the "curing or waiving of any default." Great Western Bank & Trust (Great Western), an Arizona banking corporation, objected to confirmation of a reorganization plan that provided for the cure of debtor's default on a loan by Great Western by the payment of the full principal balance owed as well as interest accrued, at a rate of 1.5%. Great Western asserted that pursuant to the terms of the loan agreement it was entitled to interest at the rate of 18% per annum in the event of default. Debtor (*Entz-White*) argued that its payment of the debt and interest under the plan amounted to a "cure" of the default and that, pursuant to

§ 1123(a)(5)(G), this cure "nullified any consequences of the default, including a post-maturity higher interest rate." 580 F.2d 1338, 1340.

The bankruptcy court, the district court and the Ninth Circuit all ruled in favor of the debtor, accepting this argument. The Ninth Circuit held:

> By curing the default, *Entz-White* is entitled to avoid all consequences of the default – including higher post-default rates. * * * It is clear that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default, including avoidance of default penalties such as higher interest.

850 F.2d 1338, 1342.

As it is binding precedent, *Entz-White* would seem to be the beginning and the end of the matter. The court of appeals begins its opinion by stating that debtor's argument was made under § 1123(a)(5)(G). Noting that this argument indeed "seems to conform to the broad language of section 1123," the court of appeals discusses § 1124(2), which determines whether a party is impaired by a chapter 11 reorganization plan. Because of this discussion, the CPUC contends that PG&E's reliance upon *Entz-White* is "way off the mark." But the CPUC's attempt to distinguish the case in this manner is "off the mark." The court of appeals considered § 1124(2) at length, but only in response to Great Western's argument that Congress intended in the bankruptcy code "to allow debtors to cure only those defaults the consequences of which are solely acceleration of the remaining payments due." *Entz-White*, 850 F.2d at 1340. The Ninth Circuit rejected this argument by analyzing § 1124(2). More importantly, the Ninth Circuit was not swayed from its belief that *Entz-White's* argument that a cure provided for in the reorganization plan nullified any consequences of default "conformed to the language of section 1123." *Id.* Indeed, in this light, the most plausible explanation for the Ninth

Circuit's lack of an extended discussion of the preemptive effect of § 1123 is that it – as did the New Hampshire bankruptcy court and the Fourth Circuit – viewed the preemptive effect of this section as evident and not requiring prolonged discussion.

The court is aware of at least one other court holding explicitly that it is "clear" that § 1123(a) affirmatively empowers actions otherwise barred by nonbankruptcy law. *See In re Buttonwood Partners, Ltd*, 111 B.R. 57, 59-60 (noting that "§ 1123 clearly contemplates that a plan may impair a class of claims 'notwithstanding any other applicable nonbankruptcy law;' an event occurring here."). *See also In re Public Serv Co*, 108 B.R. at 89 n25 (listing other cases addressing § 1123(a)(5)).

In contrast, the court is not aware of a single case, other than the decision challenged herein, holding that § 1123(a) is merely a "directive" statute, preempting only nonbankruptcy laws that might direct what should go in a reorganization plan. The CPUC urges the court to follow the decision of the Ninth Circuit in *Baker & Drake* v. *Public Serv. Comm'n* (*In re Baker & Drake*), 35 F.3d 1348 (9th Cir 1994), and, indeed, this is the case given the most attention by the bankruptcy court in the challenged order. Yet *Baker & Drake* is simply not on point.

Baker & Drake (Baker), a taxicab operator employing approximately 200 drivers, filed for chapter 11 bankruptcy. As part of its reorganization plan, Baker proposed converting its employee-drivers into independent contractors, who would lease the cabs from Baker. As noted by the Ninth Circuit, "this arrangement would shift the ultimate control over taxi services from Baker to the drivers themselves. Apart from the effect it had on Baker's tort liability and insurance premiums, Baker stood to save a good deal of money because it would no longer be liable for payroll taxes." *Id.* at 1350.

The problem, however, was that Nevada law prohibited certified "common motor carriers," such as Baker, from

leasing a taxicab to another person and required "'every driver of a taxicab [to] be either the holder of a certificate or the employee of a holder of a certificate.'" *Id.* quoting Nev. Admin. Code (NAC) § 706.371. Notwithstanding this prohibition, the bankruptcy court "not only approved the proposed reorganization plan, but also enjoined the Nevada Public Service Commission (PSC) from enforcing NAC 706.371 against Baker," based on its determination that Nevada's regulation of the taxi business conflicted with the Bankruptcy Act's goal of fostering reorganizations. *Id.* Upon appeal, the district court overturned this decision, holding that the bankruptcy code did not preempt NAC 706.731 and vacated the bankruptcy court's injunction.

The Ninth Circuit, in turn, quite sensibly affirmed this decision, rejecting Baker's claim that "the Bankruptcy Act impliedly preempts Nevada's regulation of taxi services," *id.* at 1353 (emphasis added), because, among other things, NAC 706.371 is "not just an economic regulation, but one reasonably intended to secure the public convenience and safety" and, "more importantly," because NAC 706.371 "does not directly conflict with the purposes of the Bankruptcy Act in any way which could be generalized beyond the facts of the present case." *Id.* at 1354-55.

Baker & Drake is not an express preemption case. Baker did not argue that NAC 706.371 was expressly preempted by § 1123(a)(5), or any other statutory provision, nor would it have made sense to do so. Baker was seeking to preempt ongoing state law, applying not to the transactions necessary for reorganization, but to business activities engaged in by the reorganized debtor after the reorganization. Accordingly, *Baker & Drake* is simply not relevant to the instant appeal.

But the bankruptcy court's heavy reliance upon *Baker & Drake*, *see* Bankr Dec at 12-17, does suggest why that court may have been led astray. The bankruptcy court's decision seems to have been guided by two primary concerns: the scarcity of legislative history on the relevant statutory

provisions and the concern that construing § 1123(a)(5) to grant the right "to disaggregate with unfettered preemption of any contrary nonbankruptcy law," *id.* at 40, would lead to "absurd results." *Id.* at 19. The court will discuss the legislative history of § 1123 below. But it is the bankruptcy court's list of the supposedly absurd results of PG&E's urged interpretation, which PG&E refers to as the bankruptcy court's "parade of horribles," that demonstrate how the bankruptcy court was misled. For each of these absurdities contemplates ongoing illegality, such as that at issue in *Baker & Drake*, and not conduct or action that is contemplated by PG&E in its restructuring plan. The bankruptcy court was concerned, for example, that under PG&E's interpretation a reorganization plan could approve the sale of alcohol to minors, the dumping of toxic waste or the formation of a monopoly. *See* Bankr Dec at 19. But such actions involve contemplated ongoing illegality. In contrast, PG&E seeks the suspension of nonbankruptcy law applying only to transactions necessary for reorganization and does not contend that the reorganized companies would be exempt from any laws on a going forward basis by virtue of reorganization. The graphic but undifferentiated nature of the illegalities that the CPUC contends, and the bankruptcy court accepted, would follow from holding that § 1123(a) preempts nonbankruptcy obstacles to PG&E's reorganization highlights the tenuousness of CPUC's position on this appeal.

The argument that absurd and/or undesirable consequences flow from a particular statutory construction is of little direct relevance to statutory construction. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995) (in considering preemption claims, courts "begin as * * * in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."). Nor must the court consider absurd consequences of a statutory construction, potentially embraced by the literal language of

an act, when the matters at issue do "not test the margins of the Act" but "fall within the heartland * * *." *National Cable & Telecomms Ass'n Inc* v. *Gulf Power Co.*, 534 U.S. 327 (2002). Putting the direct relevance of the "parade of horribles" to the court's task of statutory interpretation aside, however, the court is unconvinced that PG&E's interpretation of § 1123(a)(5) leads to absurd or undesirable results.

As noted, the preemption of laws otherwise applicable to restructuring transactions would not authorize ongoing illegality by the reorganized debtor and any new entities created through reorganization. Accordingly, in the unlikely event that a debtor in bankruptcy would propose such things as the sale of alcohol to minors or discharge of toxic wastes into waterways, this conduct would be reachable by the same state and federal laws designed to prohibit such conduct.

Moreover, the bankruptcy code contains several provisions making it highly unlikely that reorganization plans contemplating ongoing illegality would be seriously considered by the bankruptcy court, much less confirmed in a plan of reorganization. Section 1123(a)(5) itself requires that reorganization plans contain "adequate" means of implementation. Section 1129(a)(3) permits confirmation of a reorganization plan by the bankruptcy judge only if, among other things, it is proposed in "good faith, "§ 1129(a)(3), and "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the plan." § 1129(a)(11). The good faith test of § 1129(a)(3) has been interpreted to mean that "the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Koelbl* v. *Glessing* (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir 1984), quoting *Manati Sugar Co.* v. *Mock*, 75 F.2d 284, 285 (2d Cir 1935). *See also Connell* v. *Coastal Cable TV, Inc.*, 709 F.2d 762, 765 (1st Cir 1983) (to satisfy good faith requirement, reorganization plan "must bear some relation to the statutory objective of resuscitating a financially troubled corporation."). The Ninth Circuit has interpreted

§ 1129(a)(11) to "prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pizza of Hawaii, Inc.* v. *Shakey's Inc.* (*In re Pizza of Hawaii*), 761 F.2d 1374, 1382 (9th Cir 1985), quoting 5 Collier on Bankruptcy, 15th ed, ¶1129.02 at 1129-34 (1984). A plan contemplating ongoing illegality, of course, is quite likely to promise more than it can attain. These provisions, among others, therefore, provide ample grounds for the exercise of the bankruptcy court's discretion to refuse to confirm plans contemplating ongoing illegality.

The CPUC also asserts that PG&E's interpretation of § 1123(a)(5) could, irrespective of illegality after reorganization, shield debtors from laws designed to prohibit undesirable conduct otherwise applying to the restructuring transactions themselves. The CPUC argues, for example, that the preemption of laws otherwise applicable to transactions necessary to carry out a reorganization plan could permit anticompetitive mergers through reorganization, which would otherwise violate § 7 of the Clayton Act, 15 U.S.C. § 18, or analogous state laws, but which would not necessarily result in the formation of a monopoly, prohibited by § 2 of the Sherman Act, 15 U.S.C. § 2. The CPUC and the EPA further argue that PG&E's proposed statutory construction would permit debtors to evade such things as certain laws requiring environmental review by regulators.

The requirements of § 1129(a)(3), of course, would apply here as well, prohibiting confirmation of reorganization plans not proposed in good faith. More importantly, however, the court thinks that the CPUC's worst-case scenarios are rather more equivocal than characterized by the CPUC. Consider, for example, a corporate debtor that could reorganize in order to satisfy creditors and emerge solvent by, among other things, merging with another corporation. If such a merger would result in a monopoly then a reorganization plan proposing it would be unlikely to be confirmed. It is by no means clear, however, that a merger that would perhaps have

some anticompetitive impact reachable by § 7 of the Clayton Act or some analogous state law, but which would not result in a monopoly – and which would, moreover, rescue a debtor from bankruptcy – would be undesirable.

Nor is the court convinced that the temporary suspension of environmental review requirements that would otherwise apply to (often somewhat fictional) restructuring transactions is undesirable. In the instant case, for example, a CEQA review, according to the CPUC, is triggered by transactions incidental to PG&E's disaggregation. Permitting such review would permit state regulators to exercise a veto over the restructuring of a utility in bankruptcy, which could potentially impose a dramatic limitation on PG&E's ability to reorganize despite the fact that no change whatever were made to any PG&E operation. It is difficult for the court to discern the countervailing consideration mandating the ability of state regulators to exercise such power, when PG&E itself has, presumably, already gone through CEQA review and the four entities emerging from bankruptcy will be required to comply with all applicable state and federal laws on an ongoing basis.

Indeed, as counsel for PG&E noted at oral argument, given the strong federal interest in the rehabilitation of corporate debtors, it would seem to be the CPUC's interpretation that may well lead to absurd consequences. If § 1123(a)(5) does not permit express preemption, then the only tool for preempting laws that would otherwise bar reorganization is implied preemption, which is a rather blunt tool for such an important task.

D.

The bankruptcy court also determined that the legislative history of § 1123 did not support PG&E's interpretation, stressing two features of the legislative history that it asserted supported the interpretation that § 1123 is merely a descriptive statute. First, the bankruptcy court concluded that § 1123(a) was a "carryover from its counterparts under the

former Bankruptcy Act," which did not contain a preemption provision, but merely described provisions a bankruptcy petitioner may and must include in a reorganization plan. *See* Bankr Dec at 21. Second, the bankruptcy court found it significant that the legislative history accompanying the 1980 amendment to § 1123(a), which added the phrase "notwithstanding any otherwise applicable nonbankruptcy law" did not discuss preemption, but instead stated that: "This amendment makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section; deletes a redundant word; and makes several stylistic changes." *See id.* at 25, quoting HR Rep 96-1195, at 22, 122-23, 96th Cong, 2d Sess 1980 (July 25, 1980). "If the words 'notwithstanding otherwise applicable nonbankruptcy law' meant that a debtor could propose a plan contrary to any law," concluded the bankruptcy court, "Congress would not have treated the amendment as merely 'stylistic.'" *Id.* at 25.

The language cited by the bankruptcy court accompanied the first bill proposing the addition of the "notwithstanding" phrase. This bill and a subsequent bill, also including the proposed addition, failed. "The bill that finally became law arose from a Senate bill that referred to this change as a 'technical stylistic change []." S Rep No 65, 98th Cong, 1st Sess 84 (1983). There are no committee reports with regard to the 1984 amendments, but the change to § 1123(a)(5) was included verbatim from the prior bills under a subtitle captioned "Miscellaneous Amendments." The 1984 Amendments came out of a conference committee with no report other than the agreed-upon bill itself. On the floor the changes including the change to § 1123(a)(5) were referred to as the "technical amendments" subtitle. 130 Cong Rec S8887, S8888 (June 29, 1984)." *In re Public Serv Co*, 108 B.R. at 865. *See* App Leg History (Doc #73) at LH 001, 017, 041.

As discussed at length in *In re Public Serv Co*, 108 B.R. at 863-866, however, the most relevant change to the bankruptcy code for present purposes did not occur in 1984, with the addition of the "notwithstanding" phrase, but in 1978

with the adoption of the Bankruptcy Reform Act of 1978. Before that act, public utilities were required to obtain the approval of the utilities' governing commission before plans of reorganization could be approved. The 1978 Reform Act deleted this statutory requirement. A little history is helpful to understand the import of this.

Before 1934, corporate reorganization was primarily accomplished through equity receiverships in the federal courts. *See* 6 Collier on Bankruptcy, 14th Ed, ¶0.04 (1978). In 1933 and 1934, § 77, governing interstate railroad corporations, and § 77B, governing ordinary corporate debtors, were added by amendments to the Bankruptcy Act of 1898. *See id.* Section 77B(e)(2) addressed debtor utilities:

> In case the debtor is a utility subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, a plan of reorganization shall not be confirmed until (a) it shall be submitted to each such commission or authority having regulatory jurisdiction over the debtor, (b) an opportunity shall be afforded each such commission or authority to suggest amendments or objections to the plan, and (c) the judge shall consider such amendments or objections at a hearing at which each such commission or authority may be heard. In case the debtor is a public utility corporation wholly interstate in character no court shall approve any plan or reorganization if the regulatory commission of such State having jurisdiction over such public utility certifies that the public interest is affected by said plan, unless said regulatory commission shall first approve of said plan as to the public interest therein and the fairness thereof. If said regulatory commission shall not within thirty days or such additional period as the court may prescribe after the submission of a plan to

> it file said certificate it shall be deemed that the public interest is not affected by said plan.

Reprinted in 6 Collier on Bankruptcy, 14th Ed, ¶0.06 (1978).

Section 77B(f) further provided for state approvals before plan confirmation. The requirement of state approval for public utility plans of reorganization survived the extensive amendments to the Bankruptcy Act by the Chandler Act of 1938. Section 177, in chapter X of the amended act, provided, for example:

> In case a debtor is a public-utility corporation, subject to the jurisdiction of a commission having regulatory jurisdiction over the debtor, a plan shall not be approved * * * until—
>
> (1) it shall have been submitted to each such commission;
>
> (2) an opportunity shall have been afforded each such commission to suggest amendments or offer objections to the plan; and
>
> (3) the judge shall have considered such amendments or objections at a hearing at which such commission may be heard.

Reprinted in Collier on Bankruptcy, 15th Ed, App Pt 3(a), (2002). *See also* § 178 (requiring certification of approval of utility plan by state commission); § 224 (requiring, "in the case of a public-utility commission, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor" for the taking of "all action necessary to carry out the plan.").

In other words, the bankruptcy code at one time explicitly provided precisely what the CPUC urges is presently required to effect PG&E's plan of reorganization. But the provisions requiring approval by public utility commissions for the transactions necessary to carry out a utility's reorganization plan were not made part of the 1978 Reform Act, which, considering the inclusion of such provisions in the bankruptcy code from its origin, is a

omission that can be inferred to have some consequence. As the *In re Public Serv Co* court noted: "After 44 years of requiring state approval for public utility reorganizations, the statutory law substantially changed with the adoption of the 1978 Code * * *. There is only one reference in chapter 11 of the Bankruptcy Code to any utility regulatory agency approvals and that is for rates." 108 B.R. 854, 864, citing § 1129(a)(6) (discussed below). Moreover, as PG&E points out, the 1978 Reform Act largely carried forward the regulatory approval requirements for railroads. *See* §§ 1166 and 1172(b) ("If * * * transfer of, or operation of or over, any of the debtor's rail lines by an entity other than the debtor or a successor to the debtor under the plan would require approval by the Commission under a law of the United States, then a plan may not propose such a transfer or such operation unless the proponent of the plan initiates an appropriate application for such a transfer or such operation with the Commission and * * * the Commission * * * approves such application * * *.").

The reason for the removal of state regulatory approval for utility reorganization in the bankruptcy code does not appear to have been discussed in the legislative history accompanying the 1978 Reform Act. It is worth noting, however, that Congress established FERC as an independent agency within the Department of Energy in 1977, *see* 42 USC § 7171, shortly before enactment of the 1978 Reform Act, and granted that agency an expanded role in the dual sphere of regulation over the provision of energy, codified in the Federal Power Act, 16 USC §§ 824-824m. That the withdrawal of the ability of state regulators to veto reorganization of public utilities in federal bankruptcy proceedings followed closely behind an expanded federal role in the regulation of energy is likely not coincidence.

Nevertheless, notwithstanding a lack of legislative history explicitly discussing Congress' reasoning, the removal of the requirement of approval by state commissions is quite significant. *See Muscogee Nation* v. *Hodel*, 271 U.S. App.

D.C. 212, 851 F.2d 1439, 1444 (DC Cir 1988) ("where the words of a later statute differ from those of the previous one on the same or related subject, the Congress must have intended them to have a different meaning.").

Only one paragraph of the committee reports accompanying the 1978 Code is devoted to § 1123(a)(5), appearing in both the House and Senate reports, which reads:

> Paragraph 4 [which later became paragraph (5)] of subsection (a) is derived from section 216 of chapter X with some modifications. It requires the plan to provide adequate means for the plans execution. These means may include retention by the debtor of all or any part of the property of the estate, transfer of all or any part of the property of the estate to one or more entities, whether organized pre- or post-confirmation, merger or consolidation of the debtor with one or more persons, sale and distribution of all or any part of the property of the estate, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of maturity dates or change in interest rates of securities, amendment of the debtor's charter, and issuance of securities.

HR Rep No 595, 95th Cong, 1st Sess 407, (1977); S Rep No 989, 95th Cong, 2d Sess 119 (1977).

This language, if largely by the absence of any reference to the contingency of the specified possibilities on compliance with nonbankruptcy law or regulatory approval, seems to indicate that such actions may be taken – and not just put in a plan – notwithstanding any nonbankruptcy law. Significantly, this implication seems to have been made explicit in a statement on the floor of the Senate, by Senator DeConcini, chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, "in order to explain the House amendment to the Senate

amendment to HR 8200." 124 Cong Rec 33992 (Oct 5, 1978). Section 1123, DeConcini noted, "represents a compromise between similar provisions in the House bill and Senate amendment."

> Section 1123(a)(5) of the House amendment is derived from a similar provision in the House bill and Senate amendment but deletes the language pertaining to "fair upset price" as an unnecessary restriction. Section 1123 is also intended to indicate that a plan may provide for any action specified in section 1123 in the case of a corporation without a resolution of the board of directors. If the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable law in accordance with section 1142(a) of title 11.

Id. at 34005, emphasis added.

DeConcini's reference to § 1142(a), which imposes a duty on the debtor to carry out the plan "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition * * *," in a discussion of § 1123, would seem on first glance to make his remarks somewhat ambiguous. Section 1142 provides that a reorganized debtor and any newly created entity are obligated to carry out the plan "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition." Section 1123(a)(5) governs the obligation of a plan to provide adequate means for reorganization "notwithstanding any otherwise applicable nonbankruptcy law." Read together, these sections direct that the reorganization transactions themselves may be accomplished without hinderance from nonbankruptcy law, but that going forward from bankruptcy, the reorganized debtor and any new entities must comply with all laws in carrying out the reorganization, except those relating to financial condition.

Significantly, the very language used by DeConcini, with the insertion of the word "nonbankruptcy," in explaining the House and Senate compromise embodied in the 1978 Reform Act found its way into the act by the 1984 amendment. This may explain why the addition of the "notwithstanding" phrase was characterized as technical and stylistic; the addition of this phrase merely clarified and reaffirmed the preemptive scope of § 1123(a), intended by Congress by the enactment of the 1978 Reform Act.

The legislative history, therefore, supports PG&E's interpretation of § 1123(a)(5). But this attention to legislative history, in turn, merely supports the plain language of this section, to which, with this background, the court will now return.

The term "notwithstanding" is well recognized as a term used to express broad preemptive intent. Indeed, as noted by the Supreme Court, courts have long held that a clearer statement of an intent "to supersede all other laws" is "'difficult to imagine.'" *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993), quoting *Liberty Maritime Corp* v. *United States*, 289 U.S. App. D.C. 1, 928 F.2d 413, 416 (DC Cir 1991) and citing, among other authority, *In re FCX*, 853 F.2d at 1154. Moreover, the phrase "notwithstanding any otherwise applicable nonbankruptcy law" clearly expresses an intent affirmatively to authorize actions that are otherwise prohibited by nonbankruptcy law, which accords with PG&E's interpretation of the section. The interpretation of the CPUC and the bankruptcy court, however, would not have § 1123(a) authorize otherwise prohibited actions, but would rather have the "notwithstanding" phrase serve a much more limited role, merely clarifying that § 1123(a) is the section that designates what must go into a reorganization plan.

As PG&E correctly notes, the CPUC and the bankruptcy court have trouble coming up with any otherwise applicable nonbankruptcy laws that this phrase would override. The bankruptcy court "imagined" that the statute could preempt a

state law that "would prohibit a party from even submitting a plan to the bankruptcy court without first obtaining approval from a debtor's shareholders." Bankr Dec at 18, citing remarks by DeConcini. But § 1123(a) does not concern the procedure for submission of a plan to the bankruptcy court; it concerns what must be provided for in a plan. The same defect is present in the bankruptcy court's example of "labor laws that might obligate a plan proponent to negotiate in good faith before submitting a plan." *Id.* The CPUC's examples are no more apt.

The CPUC mentions state statutes "that provide for a dissolving corporation to file a plan of distribution containing specified mandatory elements" and suggests that § 1123(a) merely provides that those statutes "do not govern, and that section 1123(a) alone says what must be in the plan." CPUC Br (Doc #78) at 35. Two interpretations are possible under this account. Either the CPUC would have Congress mean that any other statute that specifies what must go in a reorganization plan is invalid, or the CPUC would have Congress mean that § 1123(a) is an independent supplement to other laws specifying what must go in a reorganization plan. In neither case would Congress have referred to "otherwise applicable" laws. The reference to "otherwise applicable" laws would appear to reflect Congress' intent temporarily to suspend the operation of laws of general applicability, which is not the meaning of the phrase given by the CPUC's interpretation.

The court also thinks it significant that § 1123(a)(5) requires the provision of "adequate means for the plan's implementation" in the plan. If state regulatory approval were required for all the transactions necessary to effect reorganization, how would the debtor, the court or, in the words of the bankruptcy court, "a hypothetical investor typical of holders of claims or interests of a relevant class," know whether the plan provisions were adequate or otherwise "make an informed judgment" about the plan? Bankr Dec at 22. At best, a utility could guess whether what was provided

for in a plan would be adequate for reorganization based on an estimate of the chances of regulatory approval. "Since the language of Section 1123 is obviously intended to provide for plans that could go forward for confirmation subject only to the requirements of section 1129 – including the rate approval power of a state regulatory agency – it would be nonsensical to interpret Section 1123 to simply list what a plan may include but with the result that such a plan could not be confirmed." *In re Public Serv Co*, 108 B.R. 854, 884.

Moreover, other elements of the bankruptcy code support the conclusion that Congress intended to preempt nonbankruptcy laws otherwise applicable to transactions necessary for reorganization. In particular, § 1129(a), which specifies the conditions precedent for approval of the plan by the bankruptcy court, provides that:

> (a) The court shall confirm a plan only if all of the following requirements are met:
> * * *
>
> (6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

Congress, in other words, expressly provided that a plan contemplating a rate change by a utility under the jurisdiction of a regulatory commission cannot be confirmed unless the rate change is approved by the appropriate regulatory commission. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). *See also United States* v. *Jones*, 567 F.2d 965, 967 (10th Cir 1977) (noting that "if a statute specifies one exception to the general application, other exceptions are excluded * * *."). The clear implication of § 1129(a)(6) is

that state regulatory approval is not required for plan provisions unrelated to rate changes.

The addition of § 1123(d), added by Congress in 1994, which carves out an express limitation to the preemptive effect of § 1123(a), further supports the interpretation that § 1123(a) preempts laws that may obstruct transactions contemplated by a reorganization plan. *See* Bankruptcy Reform Act of 1994, Pub L No 103-394, § 305(a), 108 Stat 4106, 4134. Section 1123(d) provides:

> Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Although the addition of this section arguably calls the specific holding of *Entz-White* into question, *see Southland Corp* v. *Toronto-Dominion*, 160 F.3d 1054, 1059 n6 (5th Cir 1998), it would indeed seem to confirm a reading of § 1123(a) as expressly preempting laws otherwise applying to plan provisions. On its face, § 1123(d) appears to carve out an exception from the broad preemptive effect of § 1123(a)(5)(G), which governs the curing or waiving of any default in a debtor's plan, by requiring that the amount necessary to cure a default shall be determined by the underlying agreement and applicable nonbankruptcy law. If § 1123(a) did not (otherwise) broadly preempt otherwise applicable laws governing, among other things, the curing of any default, the reference in § 1123(d) to "subsection (a)" would make little sense. PG&E's query aptly exposes the strained interpretation given to § 1123(d) by the CPUC: "Why would Congress have bothered to prohibit a proponent from merely proposing that a plan accomplish something that the Code bars a plan from actually accomplishing?" PG&E Supp Br at 3, emphasis in original.

Finally, the court notes that PG&E's interpretation comports more closely with the purposes of chapter 11 of the bankruptcy code. "The paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor." *In re Ionosphere Clubs, Inc*, 98 B.R. 174, 176 (Bankr SDNY 1989). "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984), citing HR Rep No 95-595, p 220 (1977). As in *In re Public Serv Co*, "the issue is a narrower one than may first appear." 108 B.R. 854, 861. PG&E contends that the bankruptcy code expressly prohibits the exercise of a veto power by state regulators over the transactions necessary to reorganize. PG&E's concern that its contemplated reorganization would be thwarted by state regulators is hardly an idle one; the CPUC's discussion of the inadequacies of federal regulation evince an entrenched resistance to relinquishing regulatory jurisdiction over PG&E's operations. *See* CPUC Br (Doc #78) at 13. But the ability of debtors to reorganize and thereby avoid liquidation under chapter 11 would be severely compromised if state regulators could thwart otherwise adequate means of reorganization. As the New Hampshire bankruptcy court observed: "Corporate reorganization cannot work without substantial restructuring of the corporate entity that is relatively prompt and free from litigation costs and delays and fragmented proceedings in numerous other forums apart from the reorganization court." 108 B.R. 854, 890.

The preemption issues raised by reorganization are particularly acute in the case of a public utility in bankruptcy, as perhaps no other debtor is subject to as much state regulation as the public utility. But the removal of the statutory right of approval by state commissions of the restructuring of public utilities by the 1978 Bankruptcy Reform Act is powerful evidence that Congress concluded that public utilities should no longer be subject to the costs,

delays and uncertainty accompanying such a requirement. The bankruptcy code at one time permitted state regulatory commissions to wield considerable power over the reorganization of public utilities. But now –with the exception of the right to approve rate changes – it does not. Nonbankruptcy laws otherwise applicable to the "restructuring transactions necessary to an effective and feasible reorganization" are expressly preempted by the bankruptcy code. *In re Public Serv Co*, 108 B.R. 854, 891.

III.

Accordingly, the bankruptcy court's March 18, 2002, order disapproving disclosure statement must be REVERSED and the matter remanded for proceedings consistent with this order.

IT IS SO ORDERED.

8-30-02

VAUGHN R WALKER

United States District Judge

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Bankruptcy Case No. 01-30923DM, Chapter 11

In re PACIFIC GAS & ELECTRIC COMPANY, Debtor.

February 7, 2002, Decided

MEMORANDUM DECISION REGARDING PREEMPTION AND SOVEREIGN IMMUNITY

I. Introduction

On September 20, 2001, Debtor, Pacific Gas and Electric Company ("PG&E"), and its corporate parent, PG&E Corporation ("Corporation", and together with PG&E, "Proponents") filed their first plan of reorganization for PG&E and a disclosure statement.

On December 4, 2001, this court conducted a status conference regarding objections to the September 20th disclosure statement, and by Order Rescheduling Hearings On Approval Of Disclosure Statement ("Rescheduling Order") filed December 5, 2001, the court fixed December 19, 2001, as the date for Proponents to file a revised plan of reorganization and a revised disclosure statement. On December 19, 2001, Proponents filed their First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company (the "Plan") and their First Amended Disclosure Statement For First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company Proposed By Pacific Gas and Electric Company and PG&E Corporation (the "Disclosure Statement").

The Rescheduling Order directed Proponents to include in the Disclosure Statement a description specifically of

> ... (1) the laws and regulations [Proponents] seek[] to preempt through confirmation of [Proponents' Plan]; (2) the governmental units affected by any such preemption; and (3) how the various transactions contemplated by the [Plan] will affect certain executory contracts and [PG&E's] obligations under those contracts.

That order set forth a schedule for consideration of various objections to the adequacy of the Disclosure Statement, including any objections to be filed by the California Public Utilities Commission ("Commission" or "CPUC"), the Attorney General of the State of California ("State"), and any other governmental unit contending that the Plan is facially invalid based upon sovereign immunity or impermissible federal preemption.

Thereafter the State, the Commission, and various other parties filed their objections, memoranda and supporting papers and Proponents and the Official Committee of Unsecured Creditors ("Committee") filed their memoranda and supporting papers in defense of the Plan and Disclosure Statement. The court conducted a hearing on the sovereign immunity and preemption challenges on January 25, 2002.

During oral argument counsel for Corporation stated "Your honor makes the law." This court doubts that with the stroke of a pen upon an order confirming the Plan it could make federal law and sweep aside a substantial body of nonbankruptcy law. Rather, the court believes its job is to interpret and apply the law, searching where in the Bankruptcy Code nonbankruptcy law is specifically preempted and where, under controlling case law, the purposes of federal bankruptcy law are frustrated such that federal law must prevail over specific conflicting state law.

For the reasons explained below, the court concludes that there is no express preemption of nonbankruptcy law that permits a wholesale unconditional preemption of numerous state laws, some of which are identified in the Disclosure

Statement and some of which are obscured by the phrase "including but not limited to." Thus, if Proponents adhere to their contention that express preemption is available to them, the Disclosure Statement must be disapproved since the Plan could not be confirmed in the face of the vigorous objections made by the State and the Commission.

Nonetheless, the court believes that the Plan could be confirmed if Proponents are able to establish with particularity the requisite elements of implied preemption. If the Disclosure Statement is amended consistent with this Memorandum Decision, the court will approve it and let the Proponents test preemption at confirmation.

The court also believes the Plan as drafted offends sovereign immunity because it seeks affirmative relief against the State and the Commission. If the Plan and Disclosure Statement are amended as Corporation's counsel intimated they would be, then the Plan will overcome the sovereign immunity defense. If, however, Proponents leave unchanged the provisions of the Plan that seek injunctive and declaratory relief against the Commission and the State, they will have to prove that there has been a waiver of sovereign immunity. In that case the Disclosure Statement must be amended to describe why Proponents believe sovereign immunity has been waived.

II. Preliminary Observations

A. In theory, if no one objected to the Plan and Disclosure Statement, Proponents are probably correct that the Plan could be confirmed. The court would not independently block an unchallenged march to confirmation. But Proponents' request that the court not "kill" the Plan now is not persuasive given the serious clash between state and federal law presented by the Plan and the Commission's and the State's strenuous opposition to it. From the commencement of this case the antagonism between PG&E and the Commission has been palpable. The sweep of preemption in the Plan and Disclosure Statement will not go

unchallenged. The situation here is not unlike what the court was presented with in the celebrated public utility bankruptcy of *Public Service Company of New Hampshire*. There the court chose to decide the preemption issue in an adversary proceeding, before confirmation. *See Public Service of New Hampshire* v. *State of New Hampshire* (*In re Public Service Company of New Hampshire*), 99 B.R. 506, 509 (Bankr. N.H. 1989) ("*Public Service*") ("In the present case there is no uncertainty or contingency about the dispute arising in concrete form between the [debtor] and the [state].") The magnitude and complexity of this case weigh heavily in favor of addressing the central issues as early as possible. Once Proponents file a revised plan and set forth in a revised disclosure statement how the various state laws and regulations frustrate Congressional purposes and objectives, the stage will be set for Proponents to attempt to establish that the Plan should preempt conflicting state law at confirmation.

B. As the development of the reorganization plan for PG&E has progressed throughout this case, Proponents have submitted mark-ups of the Plan and the Disclosure Statement as recently as February 4, 2002. Thus, for reasons wholly apart from the preemption and sovereign immunity issues, the plan of reorganization and its accompanying disclosure statement are very much works in progress. For simplicity, however, the court will refer to the Plan and the Disclosure Statement (filed December 19, 2001) for purposes of the analysis that follows. The February 4th submission has not been reviewed.

Also for convenience in this Memorandum Decision, the court's reference to nonbankruptcy "law(s)" will include statutes, regulations, Commission decisions, Commission rules, Commission resolutions and all other state law authorities that Proponents seek to preempt through confirmation of the Plan.

C. The following discussion deals with arguments made by the State and the Commission. To the extent other

objectors joined the State and the Commission, their positions are addressed below. The court will only make the following brief comments about other objections.

The California Hydropower Reform Coalition argues, in part, that the rate making authority of the Commission which is not challenged under the Plan will be implicated because its traditional jurisdiction over some of PG&E's properties will cease. It also contends that the Proponents cannot be selective, preempting some state laws but not other state and federal laws. The court is not persuaded by those arguments. Similarly, the City and County of San Francisco maintains that the deference bankruptcy law pays to state law for the definition of property rights somehow supports its opposition to Proponents' attempted preemption of state laws in the Plan. The court also rejects those arguments. Any other remaining objections by other parties are largely rendered moot in view of the obvious fact that, unless this court's decision is reversed on appeal, the Plan and Disclosure Statement will have to be modified consistent with this Memorandum Decision.

III. *Provisions of Plan Calling For Preemption*

Proponents' full-scale attack on any state law that interferes with the Plan is anything but subtle:

> Section 1123(a) of the Bankruptcy Code preempts any otherwise applicable non-bankruptcy law that may be contrary to its provisions. Accordingly, a plan may contain certain provisions that would not normally be permitted under non-bankruptcy law. For example, section 1123(a)(5) of the Bankruptcy Code authorizes, among other things, the sale or transfer of assets by [PG&E] without the consent of the State or the [Commission].

Disclosure Statement, 4:18-23.

Then they continue:

> The preemptive effect of the Confirmation Order extends to all statutes, rules, orders and decisions of

> the [Commission] otherwise applicable to the Restructuring Transactions and the implementation of the Plan. In the Proponents' view, the Confirmation Order supersedes any statute, rule, order or decision that the [Commission] might interpret to otherwise apply to the Restructuring Transactions and the implementation of the Plan *whether specified here or not*. The statutes, rules, orders or decisions thus preempted *include, but are not limited to*, the following...

Disclosure Statement, 129:15-20 (emphasis added).

Proponents argue that confirmation of the Plan will have the following results:

> Accordingly, the Proponents contend that the Confirmation Order approving the Plan and authorizing the transactions pursuant to the Plan will preempt 'otherwise applicable nonbankruptcy law' in the following areas: (1) any approval or authorization of the [Commission] or compliance with the California Pubic Utilities Code or [Commission] rules, regulations or decisions otherwise required to transfer public utility property (including authorizations to construct facilities), issue securities and implement the Plan; and (2) the exercise of discretion by any other state or local agency or subdivision to deny the transfer or assignment of any of [PG&E's] property, including existing permits or licenses, or the issuance of identical permits and licenses on the same terms and conditions as the [PG&E's] existing permits and licenses where both the Reorganized Debtor and one or more of ETrans, GTrans and Gen require such permit or license for their post Effective Date operations. Such preemption pursuant to section 1123(a) of the Bankruptcy Code shall occur at the time the Plan is implemented.

Disclosure Statement, 10:9-20.

Later in the Disclosure Statement Proponents set forth a series of California Public Utility Code Sections, Commission Decisions, Commission Resolutions or Commission Rules that they contend will be superseded by confirmation of the Plan.[2] While State and Commission challenge any preemptive effect of confirmation of the Plan, the particular sections of the Public Utilities Code, Commission rule and Commission decision that the Commission seems most concerned about are the following (with the brief explanation Proponents make in the Disclosure Statement concerning each particular code section, decision and rule):

> Public Utilities Code § 377: This section, enacted in January 2001, purports to prohibit the transfer of generating assets to Gen as part of the Plan, and to otherwise require [Commission] authorization of the

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[1] Reorganized Debtor is PG&E post-confirmation; ETrans, GTrans, and Gen are limited liability companies to be formed in connection with confirmation of the Plan.

[2] Although the Rescheduling Order directed Proponents to describe preempted laws and regulations and the affected governmental units specifically, Proponents simply stated: "See Exhibit H to this Disclosure Statement for a list of some of the state agencies and political subdivisions that *may be impacted* by the Plan." Disclosure Statement, 127:18-19 (emphasis added). "*Exhibit I* to this Disclosure Statement lists *some of the laws, regulations and rules of state agencies and subdivisions that are subject to preemption*, along with the relevant agencies." Disclosure Statement, 132:15-17 (emphasis added). In view of the court's decision that Proponents' theory of express preemption must be rejected, and implied preemption applied specifically as to each offending law, the objections by various parties that Proponents did not comply with the precise terms of the Rescheduling Order, although meritorious, will be treated as moot.

transfer of those assets under Public Utilities Code § 851.

Public Utilities Code § 451: The [Commission] could interpret this section to conflict with the Bankruptcy Court's establishment of the conditions under which the Reorganized Debtor may resume procurement of the net open position or the transfer of any of [PG&E's] assets or businesses to any of ETrans, GTrans or Gen. To that extent, § 451 would be preempted.

Public Utilities Code § 453: The [Commission] could interpret § 453 to preclude the Reorganized Debtor entering into the power sales agreement with Gen, the transportation and storage services agreement with GTrans, and some or all of the transitional service agreements with ETrans, GTrans and Gen. To that extent, § 453 would be preempted.

Public Utilities Code §§ 816-830: These sections govern the issuance by a public utility of debt or equity securities, among other things requiring the approval of the [Commission] prior to the issuance. These sections are preempted because the Confirmation Order will authorize the issuance of securities and the financings that are required for the Restructuring Transactions and the implementation of the Plan.

Public Utilities Code § 851: This section would require approval of the [Commission] before [PG&E] could 'sell, lease, assign, mortgage, or otherwise dispose of or encumber' its property, including certificates of public convenience and necessity, pursuant to the Plan. The Bankruptcy Court's Confirmation Order would preempt the need for this authorization.

[Commission] Resolution L-244: By this Resolution, the [Commission] purported to prohibit [PG&E]

> from moving its gas transmission assets to FERC jurisdiction under the NGA without express authorization by the [Commission]. The Bankruptcy Court's Confirmation Order would preempt the need for this authorization, even if it were an otherwise lawful requirement. (Footnote omitted.)
>
> [Commission] Gain on Sale 'Rules': Over the years, the [Commission] has issued a number of often-inconsistent decisions assigning or allocating the gain on the sale of public utility property to or between shareholders and ratepayers. To the extent that the [Commission] attempts to apply its gain on sale 'rules' in a manner that results in the application of proceeds from property sold pursuant to the Plan other than as provided for in the Plan or that imputes a 'gain on sale' from the transfer of assets or the other Restructuring Transactions or implementation of the Plan, such action would be preempted. (Footnote omitted.)
>
> D.01-12-017 (December 11, 2001), Ordering Paragraph 5: In this Decision, issued December 11, 2001, the [Commission] attempts to exercise control over [PG&E's] property by purporting to 'reserve[] the right to claim a return of the full value of the asset to [PG&E's] ratepayers' should the Bankruptcy Court authorize the transfer of [PG&E's] transmission assets pursuant to the Plan. Inasmuch as this is a direct attempt to interfere with the Plan, this Decision is preempted.

Disclosure Statement, 129:21-131:15.

A core feature of the Plan is referred to by the parties as "disaggregation," meaning PG&E's creation of three new limited liability companies and the separation of all of PG&E's operations primarily into four lines of business based upon PG&E's historical functions: retail gas and electric distribution, to be carried out by Reorganized Debtor; electric

transmission, to be carried out by ETrans, LLC ("ETrans"); interstate gas transmission, to be carried out by GTrans, LLC ("GTrans"); and electric generation, to be carried out by Electric Generation, LLC ("Gen", and collectively with ETrans and GTrans, the "LLC's"). Disclosure Statement 6:16-20.

For the disaggregation of the electrical transmission, the Plan contemplates that ETrans and the Proponents:

> shall seek an affirmative ruling of the bankruptcy court, which may be the Confirmation Order, that, pursuant to section 1123 of the Bankruptcy Code, the approval of any California state and local Governmental Entity, including but not limited to, the [Commission], shall not be required in order to, among other things, transfer or operate the ETrans Assets, for the transfer and use of various permits, licenses, leases, and other entitlements in connection with the transfer and operation of the ETrans Assets, to transfer operational control of its transmission facilities . . . to issue securities, to assume the ETrans liabilities or to otherwise effectuate the Restructuring Transactions.

Plan, 60:24-61:4.[3]

As shown above, Proponents want the Plan to preempt the Commission's "gain on sale" rules. As a condition precedent to confirmation of the Plan, the Plan requires this court to enter an order prohibiting officials of the Commission and officials of the State ". . . from taking any action related to the allocation or other treatment of 'gain on sale' related to assets transferred or disposed of under the

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[3] Comparable language appears for the transactions involving Reorganized Debtor (Plan, 72:10-18), Gen (Plan, 66:13-22) and GTrans (Plan, 63:11-18).

Plan that would adversely impact the Reorganized Debtor."[4] In their response to the preemption and sovereign immunity objections, Proponents concede that the relief sought in connection with the "gain on sale" rules are in the nature of an injunction. At the same time, Proponents have indicated that even that injunctive provision would be amended, and thus be limited to seeking declaratory relief only. For purposes of the present analysis, however, the court will assume that Proponents desire confirmation to constitute an injunction against enforcement of those rules.[5]

IV. Issues

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[4] The Disclosure Statement is conspicuously lacking in any detailed information that describes the operation of those rules and how they would affect the post-confirmation activities of the Reorganized Debtor, the LLC's, or any other entity. More information is needed regardless of the ultimate outcome of the sovereign immunity issue if Proponents wish to attempt to preempt those rules.

[5] The specific provisions of the Plan which would carry out the preemptive effect of confirmation appear to be the following: Article VII, Implementation Of The Plan, including § 7.1(k)(ii), (as to ETrans), referring to Bankruptcy Code section 1123; § 7.2(i)(ii) (as to ETrans), referring to Bankruptcy Code section 1123; § 7.3(j)(ii) (as to Gen), referring to Bankruptcy Code sections 1123 and 1142(b); § 7.5(n)(iii) (as to Reorganized Debtor), referring to Bankruptcy Code section 1123; and § 7.5(e), prohibiting assumption of the net open position. In Article VIII, Confirmation and Effectiveness of the Plan, the following subparagraphs of § 8.1, Conditions Precedent to Confirmation are noted: (b) declaring that Proponents and their respective affiliates are not liable for Department of Water Resources contracts; (c) prohibiting assignment of the Department of Water Resources contracts; (d) prohibiting assumption of the net open position; (g) prohibiting officials of the Commission and the State from enforcing the "gain on sale" rules; (h) declaring Commission's affiliate transaction rules not applicable; and (i) calling for approval of the Restructuring Transactions as preempted by Bankruptcy Code section 1123.

In order to decide whether to approve or disapprove the Disclosure Statement, the court must answer the following questions.

A. Does the Bankruptcy Code expressly or impliedly preempt California laws so that Proponents may ignore them and seek to obtain confirmation of the Plan?

B. Does sovereign immunity protect the Commission and the State from the declaratory and injunctive relief requested by Proponents in the Plan?[6]

V. Discussion

A. Preemption.

1. Overview

In *Baker & Drake, Inc.* v. *Public Service Commission of Nevada* (*In re Baker & Drake, Inc.*), 35 F.3d 1348 (9th Cir. 1994) ("*Baker & Drake*"), the Ninth Circuit Court of Appeals quoted Supreme Court authority on preemption:

> "It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with or are contrary to, federal law.'"

Baker & Drake, 35 F.3d at 1352, *quoting Hillsborough County* v. *Automated Medical Labs, Inc.*, 471 U.S. 707, 712 (1985) (*quoting Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)).

"In considering a preemption claim; we look first to the intent and sweep of the federal statute." *Baker & Drake*, 35

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[6] The court conducted an emergency telephone conference with counsel for Proponents, the Commission, the State and others two days prior to the oral argument in this matter. Pursuant to the instructions of the court during that conference, any issue about whether sovereign immunity had been waived was deferred and the question will not be addressed in this Memorandum Decision, notwithstanding the fact that Proponents argued the doctrine of waiver extensively in their written submissions.

F.3d at 1352. More elaborately, the Supreme Court has stated that:

> the purpose of Congress is the ultimate touchstone" in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of *congressional purpose*. " Congress'intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant, however, is the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. *Lohr*, 518 U.S. 470, 485-86 (1996) (emphasis in original, citations omitted).

As *Baker & Drake* observed, there are several types of preemption:

> The statute's preemptive intent may be either express or implied:
>
> Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within Constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Absent express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-motion of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that I twill be assumed to preclude enforcement of state laws on the same subject."

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or *when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*."

Baker & Drake, 35 F.3d at 1352-53 (emphasis added), *quoting Hillsborough County*, 471 U.S. at 713 (citations omitted).

Only the two emphasized types of preemption above are at issue: express preemption and the last category of implied preemption. Proponents have not urged the court to consider the "Congress left no room" and "federal law is so dominant" types of preemption.

Express preemption has been defined as "where Congress explicitly defines the extent to which its enactments preempt state law." *Williamson* v. *General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000), *cert. denied*, 531 U.S. 929. *See also English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990) ("Congress can define explicitly the extent to which its enactments pre-empt state law").

Implied preemption was addressed by *Baker & Drake*, which examined whether the state law at issue was an obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws. *Baker & Drake* reviewed two Supreme Court cases that are critical to this court's analysis of the present controversy: *Perez* v. *Campbell*, 402 U.S. 637 (1971), and *Midlantic National Bank* v. *New Jersey Depart. of Environmental Protection*, 474 U.S. 494 (1986). *Perez* concluded that the Bankruptcy Code preempted state law that interfered with a discharge in bankruptcy and *Midlantic* acknowledged that the Bankruptcy Code does not preempt state environmental laws or regulations reasonably designed to protect the public health or safety from imminent

and identifiable harm. Referring to both decisions, the Ninth Circuit set forth a template which this court finds not only helpful, but controlling in resolving this dispute:

> As we view these cases, they suggest that federal bankruptcy preemption is more likely (1) where a state statute facially or purposefully carves an exception out of the Bankruptcy Code, or (2) where a state statute is concerned with economic regulation rather than with protecting the public health and safety.

Baker & Drake, 35 F.3d at 1353. *See also Midlantic*, 474 U.S. at 506 n. 9 and accompanying text.

One of the cases Proponents feature prominently in their argument is *Public Service Company of New Hampshire* v. *State of New Hampshire* (*In re Public Service Company of New Hampshire*), 108 B.R. 854 (1989) ("*PSNH*"). There, the court – years before *Baker & Drake* – stated the same principle:

> However, federal preemption is more likely when the state "police power" involved is economic regulation rather than health or safety."

PSNH 108 B.R. at 869. The court then cited one of Proponents' counsel in a discussion about preemption under the Commerce Clause of the Constitution:

> State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as "undue burdens on interstate commerce" than are state regulations evidently seeking to maximize the profits of local businesses. Indeed, where the Supreme Court has held that the national interest in the free flow of commerce supersedes a state interest in public safety, it has generally seemed that the challenged statute contributed only marginally if at all to the public safety.

Id., *quoting* L. Tribe, *American Constitutional Law*, p. 437 (2d ed. 1988).

It is important to point out that this court does not read *Baker & Drake* as holding that there can be no preemption of state law except where express preemption appears in the statute. If that were the holding, this matter would be over and the Disclosure Statement would be disapproved. Rather, the court believes there are clear signals in the decision that suggest that there can be implied preemption. First, the above-quoted reference to "economic regulation rather than . . . protecting the public health and safety" suggests a balancing test. Next, the court stressed that while there can be a reorganization, it just may be difficult:

> Congress in enacting the Bankruptcy Code was not to mandate that every company be reorganized at all costs, but rather to establish a preference for reorganizations, where they are *legally feasible and economically practical.*

Baker & Drake, 35 F.3d at 1354 (italics in original; emphasis added).

Further, noting that a Nevada statute at issue was promulgated as part of a safety measure, the court pointed out that if compliance with that statute were to render the debtor financially unable to reorganize, neither it nor the state would be violating any provision of the Bankruptcy Code. But in a footnote the court pointed out that the debtor had not shown that complying with the statute would make a successful reorganization impossible in its case. *Id.*, n. 5. The powerful inference, therefore, is that under appropriate circumstances the state statute could be preempted with a proper showing of what is necessary to make the reorganization possible.

One more general principle of preemption is particularly apropos: deference to areas of traditional state regulation.

> In all preemption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start

> with the assumption that the historic police powers of the States were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress."

Medtronic, 518 U.S. at 484. *See also CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) ("[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.").

Public utility regulation and environmental regulation are both areas where this deference applies. *See Pacific Gas and Elec. Co.* v. *State Energy Resources Conservation & Development Com'n*, 461 U.S. 190, 206 (1983) ("Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress"); *Fireman's Fund Ins. Co.* v. *City of Lodi*, 271 F.3d 911, 932-33 (9th Cir. 2002) (as amended) ("we are 'highly deferential' to local legislation in areas such as environmental regulation, which 'traditionally has been a matter of state authority'") (citation omitted).

With this overview in mind, the court turns to Section 1123(a)(5).[7]

2. Preemption under Section 1123(a)(5) generally

a. Language of the Statute

Section 1123(a)(5) provides, in relevant part:

> § 1123. Contents of Plan
>
> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall –

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[7] Unless otherwise indicated, all Section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

> (5) provide adequate means for the plan's implementation, such as –
>
> > (B) transfer of all or any part of the property of the estate to one or more entities ...
> >
> > (D) sale of all or any part of the property of the estate, ...

11 U.S.C. § 1123(a)(5)(B) and (D).

Starting with the words of the statute, paragraph (5) of Section 1123(a) says only that the plan shall "provide *adequate means* for the plan's implementation, *such as* [various alternatives]." 11 U.S.C. § 1123(a)(5) (emphasis added). Paragraph (5) can be read simply as a directive to the plan proponent about what must go into the plan. It does not have to be read as an "empowering" statute that, under Proponents' construction, would permit them to do whatever they wanted – "such as" but not limited to the statutory examples – subject only to the requirements of Section 1129.[8]

This construction – interpreting Paragraph (5) as directive rather than empowering – does not read the "notwithstanding" clause out of the statute. As several parties suggest, that clause still serves a useful purpose by preempting any state law that, for example, would prohibit a party from even submitting a plan to the bankruptcy court without first obtaining approval from a debtor's shareholders. The court can imagine other examples, such as labor laws that might obligate a plan proponent to negotiate in good faith with unions before submitting a plan or corporate laws that

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[8] Moreover, there is some ambiguity in Congress' use of the words "adequate means" for the plan's implementation. If Congress had meant "*any* means, provided they are adequate," it could have said so. *See Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 529 and n.27, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (rejecting "theoretical elegance" of interpreting statute at highest or lowest level of generality in favor of middle ground "fair understanding of congressional purpose").

would require "a resolution of the board of directors" before a plan could be proposed. 124 Cong. Rec. H11103 (Sept. 28, 1978); S17419 (Oct. 6, 1978) (statement of Senator DeConcini).[9]

Not only is Proponents' reading unnecessary, it leads to absurd results. At the hearing on January 25, 2002, the court questioned whether under Proponents' reading of Section 1123(a)(5) there would be any limit to what a debtor could do. The court asked counsel about several hypothetical situations, following the Supreme Court's directive to discern "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486. The court questioned whether a plan could provide for a debtor to sell liquor to minors (notwithstanding state laws to the contrary), or trade with foreign enemies (notwithstanding federal statutes to the contrary), or dump toxic wastes (notwithstanding environmental laws and Supreme Court precedent), or merge with competitors to create a monopoly or gain some other competitive advantage (in violation of

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[9] The court is not at all troubled that the above construction involves a relatively minor role for the "notwithstanding" clause as applied to Paragraph (5). *See Medtronic*, 518 U.S. at 484 (even where express preemption is clear, "we must nonetheless 'identify the domain expressly preempted'"). That clause does not appear to apply at all to some Paragraphs of Section 1123(a). For example, it is doubtful Congress saw any need to preempt nonbankruptcy laws that might contradict Paragraph (2). That paragraph only requires a plan to "specify any class of claims or interests that is not impaired under the plan." What nonbankruptcy law would contradict that provision? *See also* 11 U.S.C. § 1123(a)(1) (plan shall designate classes) and (a)(3) (plan shall specify treatment of impaired classes). *Compare* 1123(a)(6) (corporate debtors must include in their charter a ban on issuance of nonvoting securities, notwithstanding any contrary nonbankruptcy law) *and* 1123(a)(7) (governing selection of officer, director, or trustee under the plan, notwithstanding any contrary nonbankruptcy law).

state or federal antitrust laws). There were no satisfactory answers.[10]

Taken in context, Section 1123 looks more like a component of Congress' roadmap that heads towards confirmation. First, Subchapter II of Chapter 11, entitled "The Plan," begins by stating by whom and when plans may be filed (Section 1121. Who may file a plan); then directs how a plan is to position creditors and owners (Section 1122. Classification of claims or interests); next prescribes what goes into a plan (Section 1123. Contents of plan). That section, and in particular its internal structure, is a "blueprint" the plan proponent is to follow when constructing what has been characterized as resembling a contract. *Hillis Motors, Inc.* v. *Hawaii Automobile Dealers' Association*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.")

The mandatory rules Congress has established for that contract include the designation of classes of claims or interests (Section 1123(a)(1)); the designation of not impaired classes of claims or interests (Section 1123(a)(2)); the treatment of impaired classes of claims or interests (Section 1123(a)(3)); equal treatment of classes, unless members agree

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[10] The most offensive plans might be reined in by something like *Midlantic's* limitation on abandonment of toxic wastes. *See Midlantic*, 474 U.S. at 494. That decision, however, arose under Section 554, which does not have the "notwithstanding" clause. *See* 11 U.S.C. § 554. Moreover, *Midlantic* was strictly limited to state laws or regulations reasonably designed to protect the public health or safety from "imminent" and "identifiable" harm. *See Midlantic*, 474 U.S. at 506 n. 9 and accompanying text. The potential harm from antitrust violations, for example, might not be imminent and clearly identifiable, but the court does not believe Congress intended to eviscerate all antitrust laws for debtors in bankruptcy (especially solvent debtors). In other words, *Midlantic* does not cure the problems with Proponents' reading of the statute.

otherwise (Section 1123(a)(4)); adequate means for implementation (Section 1123(a)(5)); corporate charter provisions (Section 1123(a)(6)); and provisions consistent with public policy for selection of officers, directors and trustees (Section 1129(a)(7)).

A plan that lacks any of these seven components (except where one or more may be inapplicable) is structurally defective because the "shall" directive of Section 1123(a) has not been satisfied.[11]

In view of the scant legislative history about Section 1123 discussed, *infra*, it is apparent that that section is largely a carryover from its counterparts under the former Bankruptcy Act. Section 91 of that Act (former 11 U.S.C. § 91) described provisions a Chapter IX petitioner "may include" in a plan (provisions modifying or altering rights of creditors generally; other provisions not inconsistent with Chapter IX; provisions for rejection of executory contracts or unexpired leases). Section 216 of the Bankruptcy Act (former 11 U.S.C. § 616) contained nine subparagraphs beginning with "shall include in," "shall provide for," or "shall specify." Five subparagraphs provided that the plan "may" deal with, provide for, or include other provisions.[12]

In Chapter XI, Bankruptcy Act Section 356 (former 11 U.S.C. § 756) required inclusion of provisions dealing with unsecured creditors ("An arrangement [Bankruptcy Act practitioners will recall the phrase "plan of arrangement" in Chapter XI practice] within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or some class of them, upon any terms or for any consideration.") Then Bankruptcy Act Section 357 (former 11 U.S.C. § 757) set forth eight

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[11] In Section 1123(b) Congress has given plan proponents various options that a plan may contain. Those options are not relevant to this discussion.

[12] *See* footnote 15, *infra*, and accompanying text.

subparagraphs specifying provisions an arrangement "may include."

Finally in Chapter XII, Bankruptcy Act Section 461 (former 11 U.S.C. § 861) resembled Section 216 (in Chapter X) and set forth seven "shall" include, provide or specify subparagraphs and six "may" subparagraphs.

Under the Bankruptcy Act there was no counterpart to today's disclosure statement. Now in Section 1125 Congress has directed that adequate information be provided that would enable a hypothetical investor typical of holders of claims or interests of a relevant class to make an informed judgment about the plan. In practice it is in the disclosure statement that plan proponents set forth a description of their business, the reasons for their financial difficulties, historical and current financial information, material post-petition events, a summary of assets and liabilities, a description of the plan, and perhaps most importantly, a means for effectuating the plan.[13]

This court is convinced that the contents of the plan's provisions, and in particular those found in Section 1123(a)(5), are derived from the Bankruptcy Act that required the plan to tell creditors what they were going to get and how they were going to get it. That is still the purpose of the section.

From the foregoing the court rejects the notion that Congress, without a hint in the legislative history, in a section

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[13] For example, the United States Trustee's Guidelines For Region 17 (covering this district) include a requirement that the disclosure statement include:

> (j) MEANS OF EFFECTUATING THE PLAN: The statement should include how the goals of the plan are to be accomplished, *e.g.*, infusion of cash by an investor, sale of real or personal property, continued business operations, or issuance of stock. If an investor is to provide funds, financial information about the investor should be included.

of the Bankruptcy Code entitled "Contents Of Plan," and using words calling for "adequate means for the Plan's implementation," intended to permit a debtor's plan – confirmed by a bankruptcy judge (not by a legislative act, as in most preemption situations)[14] – to obliterate a whole area of jurisdiction and authority traditionally left to state law. If the PSNH court thought this was a simple matter of "plain meaning" (PSNH, 108 B.R. at 874-879), that interpretation was a far cry from its observation only a few months earlier, that there was an

> . . . ambiguity left in the statute by Congress in the enactment of the .1978 Code. Bankruptcy Code §§ 1123(a)(5); 1129(a)(3) and 1129(a)(6).

Public Service, 99 B.R. at 509.

b. Legislative History of Section 1123

Proponents contend that by inserting the clause "notwithstanding any otherwise applicable law" into Section 1123, Congress expressly exempted all state laws inconsistent with what a plan proposes and a court chooses to confirm. Nothing in the legislative history of Section 1123, however, indicates that its drafters intended for state law to be so expansively preempted. To the contrary, the absence of any meaningful discussion regarding the purpose and consequences of the clause demonstrates that Congress did not draft Section 1123 as a blanket preemption of state law.

Section 1123(a), as initially enacted, did not state that its provisions were applicable "notwithstanding any otherwise applicable nonbankruptcy law." The legislative history of Section 1123 does not indicate that its provisions preempt state law; rather, the legislative history suggests that Section

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[14] *See, i.e., Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988).

1123 is derived from Section 216[15] of the Bankruptcy Act (also known as the Bankruptcy Statute of 1898). The House Report pertaining to the Bankruptcy Reform Act of 1978 states that, with respect to sections 1123(a)(5):

> Subsection (a) specifies the matter that a plan of reorganization must contain. . . Paragraph (4) [now paragraph (5)] of subsection (a) is derived from section 216 of current law, with some modifications. It requires the plan to provide adequate means for the plan's execution. These means may include retention by the debtor of all or any part of the property of the estate, transfer of all or any part of the property of the estate to one or more entities, whether organized pre- or postconfirmation, merger or consolidation of the debtor with one or more persons, sale and

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[15] Section 216 of the Bankruptcy Act did not contain any provision preempting state law. Subsection 216(10) (the subsection from which section 1123(a)(5) is derived) provided:

A plan of reorganization under this chapter –

* * *

. . . shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all of or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancellation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes. . . .

> distribution of all or any part of the property of the estate, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of maturity dates or change in interest rates of securities, amendment of the debtor's charter, and issuance of securities.

H.R. Rep. 95-595, 1978 U.S.C.C. A.N. 5963, 6363, 95th Cong., 1st Sess. 1977 (Sept. 8, 1977). The foregoing legislative history of section 1123, as initially enacted, does not indicate that it preempts state law.

In 1980, Congress amended Section 1123(a) to add the phrase "notwithstanding any otherwise applicable nonbankruptcy law." Despite this change, the legislative history accompanying the amendment states that "This amendment makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section; deletes a redundant word; and makes several stylistic changes." H.R. Rep. 96-1195, at 22, 122-23, 96th Cong., 2d Sess. 1980 (July 25, 1980). If the words "notwithstanding otherwise applicable nonbankruptcy law" meant that a debtor could propose a plan contrary to any law, Congress would not have treated the amendment as merely "stylistic." More importantly, the observation that the amendment "makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section" indicates that this section (and no other law) governs what is to be placed into a plan of reorganization.[16] It does not indicate that whatever is placed into a plan of reorganization preempts state law. The legislative history of Section 1123(a) simply does not support the revolutionary significance that PG&E attributes to the amendment.

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[16] This phrase further supports this court's conclusion that Section 1123(a)(5) is a directive as opposed to an empowering statute.

c. Case Law

Proponents cite several cases in support of their reading of Section 1123(a), and they point out that parties opposing the Plan have cited no case to the contrary. Proponents' cases, however, are all distinguishable.

Proponents' two leading cases are *PSNH* and *Universal Cooperatives, Inc.* v. *FCX, Inc.* (*In re FCX, Inc.*), 853 F.2d 1149 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) ("*FCX*").

In *PSNH* the proposed plan of reorganization was very similar to Proponents' Plan. It involved:

> the proposed use of § 1123(a)(5) of the [Bankruptcy] Code to authorize transfer of assets and restructuring of entities [of the public utility therein, PSNH,] in such a fashion as would result in transfer of regulatory jurisdiction over the debtor and its rates from the New Hampshire Public Utilities Commission ["NHPUC"] to the Federal Energy Regulatory Commission ["FERC".]

PSNH, 108 B.R. at 857 (quoting court's earlier order).

The State of New Hampshire apparently opposed *PSNH's* plan because moving into federal jurisdiction

> would enable PSNH to recover much of its investment in the Seabrook nuclear power plant even before Seabrook operates[,] in contrast to what state law would allow before operation under the "Anti-CWIP" law in New Hampshire.

PSNH, 108 B.R. at 860 (footnotes omitted).

In this context the *PSNH* court conducted a scholarly, thorough and helpful analysis of the legislative history and statutory framework. Focusing on the history of Section 1129(a)(6), the *PSNH* court noted that "prior to 1978 public utilities had to have public utility commission approval for plans of reorganization." *Id.* 108 B.R. at 863. Then, with the adoption of the Bankruptcy Reform Act of 1978, regulatory approval was explicitly required for reorganizations involving

railroads and municipalities, but no such explicit requirement applied to non-railroad reorganizations under chapter 11 except that Section 1129(a)(6) requires regulators' approval for any change in rates. *See* 11 U.S.C. § 943(b)(6) (municipalities), § 1129(a)(6) (rates), § 1172(b) (railroads), *and PSNH*, 108 B.R. at 864-66. Considering this history and its reading of Section 1123(a)(5) as an "empowering" statute, the *PSNH* court held that NHPUC did not have an absolute "veto" power over PSNH's plan of reorganization. *Id.* 108 B.R. at 883 and 891.[17]

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[17] The *PSNH* court stated:

> In my opinion, the reorganization process of chapter 11 cannot work – in the way that Congress envisioned under the drastic overhaul of the reorganization chapters in the 1978 Act [*i.e.*, when it removed the veto power of public utility commissions from Chapter 11 cases generally] – if one party in interest has an effective veto over the necessary restructuring to implement a plan *and* the reorganization court no longer has an early and direct role in plan formulation and approval.

PSNH, 108 B.R. at 891 (emphasis in original).

After the *PSNH* decision, Congress considered amending Section 1129(a)(6). As summarized by the legislative history, the amendment would have provided that electric utilities would need state regulators' approval not only for confirmation of any plan but also to "take any other action pertaining to the debtor that would terminate or restrict the existing jurisdiction of the state regulatory authority." H.R. Rep. 101-1015, at 43, 1991 WL 4376 (Leg. Hist.), 101st Cong., 2d Sess. 1990 (Jan. 3, 1991).

Congress did not enact this absolute veto power. If Congress' failure to act has any weight at all, it is entirely consistent with the disposition herein. The Bankruptcy Code neither gives an absolute preemption power to Proponents nor an absolute veto power to the State and the Commission. Rather, each alleged instance of implied preemption must be tested to determine whether the particular state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Baker & Drake*, 35 F.3d at 1353 (citation omitted).

The *PSNH* decision relies on express preemption, which has been rejected above. Nevertheless, as an alternative basis for its conclusion *PSNH* relies on implied preemption, and its analysis appears generally consistent with *Baker & Drake's* observation that federal bankruptcy preemption is more likely "where a state statute is concerned with economic regulation rather than with protecting the public health and safety." *Baker & Drake*, 35 F.3d at 1353.[18]

According to *PSNH*: (1) the State of New Hampshire's concerns were purely economic not health or safety (*PSNH*, 108 B.R. at 890), (2) "the inescapable result of the State's position is that no plan can be confirmed in this case unless it is approved by the [NHPUC]" (*id.* 108 B.R. at 861, emphasis in original),[19] (3) the consequent jurisdictional "stalemate" would be inimical to the "prompt and orderly processes necessary to an effective reorganization 'before the patient dies'" (*id.* at 856 n. 1, 890 and 891), and (4) the Bankruptcy Code "would seem to indicate" a preemptive intent as to "restructuring provisions of a chapter 11 plan of reorganization" (an express intent, according to *PSNH*) (*id.*

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[18] It is noteworthy that, having decided that express preemption pertains, the court in *PSNH* immediately qualified the so-called unconditional preemption:

> In terms of the literal language of § 1123(a)(5) it seems obvious that the section on its face contemplates that restructuring transactions necessary to a plan of reorganization may be provided. . . .

PSNH, 108 B.R. at 881 (emphasis added).
Since there is nothing in the statute about "necessary" it seems the court was really considering implied – or better yet "applied" – preemption.

[19] "[If] the PUC has the last say about everything, we may as well close up our tents and send it over to the PUC, let them reorganize this company and when they have approved it, send it over and I'll sign it." *PSNH*, 108 B.R. at 887 (quoting hearing transcript).

108 B.R. at 882).[20] The *PSNH* court specifically reserved some issues for the hearing on plan confirmation:

> 1. Those aspects of the debtor's plan of reorganization . . . or any amended plan containing similar provisions . . . that are *necessary and required* to effectuate the "restructuring" of the debtor into a reorganized entity or entities capable of achieving a feasible reorganization, subject to the confirmation requirements of § 1129 of the Bankruptcy Code, and are actions specifically covered by § 1123(a)(5) of the Bankruptcy Code, may be approved as part of confirmation . . . notwithstanding any otherwise applicable law that would require approval of such actions by the New Hampshire Public Utilities Commission.* * *
>
> 3. Whether such restructuring is necessary and required for a feasible reorganization will be a § 1129 issue . . . .
>
> 4. . . . the effect on the public interest of such a plan arguably will be one of the factors to be considered at confirmation . . . .

PSNH, 108 B.R. at 892-893 (Appendix ¶¶ 1, 3 and 4) (emphasis added).

The *PSNH* decision emphasized that "the issue is a narrower one than may first appear." *Id.* 108 B.R. at 861. The essential holding of *PSNH* is only that the Bankruptcy Code preempts the public utility commission's absolute "veto" power over a bankruptcy restructuring. The *PSNH* decision noted that, ironically, the bankruptcy restructuring might have been "essential to restoring the enterprise to financial health so it can then comply with ongoing regulatory requirements." *Id.* 108 B.R. at 890 n. 38 and 891 (emphasis in original).

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[20] According to the *PSNH* court, the State of New Hampshire "does not really argue to the contrary." *PSNH*, 108 B.R. at 882. Here the State and the Commission do!

Moreover, the *PSNH* court emphasized that there was no preemption of such ongoing regulatory requirements:

> Nothing in § 1123 or § 1129 of the Bankruptcy Code has the effect of exempting the reorganized entity or entities under a confirmed plan of reorganization from any ongoing applicable regulatory requirements by NHPUC as to the future operations of said entity or entities (save for any questioning of the restructuring itself) once the restructuring necessary and required for a feasible reorganization has been effectuated as part of a confirmed plan of reorganization.

PSNH, 108 B.R. 893 (Appendix P 5).

The *PSNH* court acknowledged that NHPUC might lose its rate-setting jurisdiction over some reorganized entities because they would come under FERC jurisdiction,

> [but] the argument that "Congress didn't intend to take rate-setting authority from the states" by § 1123 of the Bankruptcy Code is simply misplaced. Congress already considered the public interest when it withdrew considerable regulatory authority from the states in its FERC legislation, as affirmed in the preemption decision by the Supreme Court in *Mississippi Power & Light* v. *State of Mississippi*, 487 U.S. 354 [1988] . . . .
>
> Like it or not, Congress has decreed that local rates can be determined by FERC . . . . Congress apparently believes that regional requirements and regulation sometimes have to override local state requirements to have a rational power supply system in the country.

PSNH, 108 B.R. at 872 (footnotes omitted).

The court does not disagree with most of the *PSNH* analysis. Although the court cannot agree that Section 1123(a)(5) is an "empowering" statute that explicitly preempts or overrides all contrary nonbankruptcy law, the

court agrees that restructuring generally is a proper purpose of chapter 11 and that the Bankruptcy Code would seem to indicate at least some preemptive intent in favor of restructuring, which would preempt a state regulator's absolute veto power over bankruptcy restructuring. *See PSNH*, 108 B.R. at 882. To the extent that *PSNH* implies a broader preemption, it may be factually distinguishable because (a) any economic need for PG&E to disaggregate is not immediately obvious, unlike in *PSNH*, and (b) the objecting parties in this case advance some non-economic concerns, unlike the State of New Hampshire in *PSNH*. *See Baker & Drake*, 35 F.3d at 1353 (bankruptcy preemption more likely for economic regulation rather than public health and safety).

No evidence exists at this stage in the reorganization process whether PG&E has an economic need to disaggregate. In *PSNH*, unlike this case, the court questioned the debtor's solvency and emphasized the need to reorganize "before the patient dies." *PSNH*, 108 B.R. at 856 n. 1, 890 n. 38, and 891. The Proponents and the Committee have suggested that there is some economic need to disaggregate because the financial markets effectively may require it.[21] The court agrees with *PSNH*, however, that "whether such restructuring is necessary and required for a feasible reorganization will be a § 1129 issue." *PSNH*, 108 B.R. at 892, Appendix P 3. Preemption and feasibility can be addressed in that context, but only after further elaboration in a revised Disclosure Statement.

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[21] Apparently the Proponents and the Committee believe that PG&E's creditors will need to be paid over time, that this requires debt securities, and that the debt securities will not be acceptable to the financial markets, or perhaps will not trade at par, unless PG&E's business is removed to some extent from the Commission's jurisdiction by disaggregation. The court makes no determination on these issues.

As to non-economic considerations, the State, the Commission and other objectors have argued that Proponents are abusing the bankruptcy process to escape the Commission's jurisdiction. To the extent that this is a "facial invalidity" objection the court rejects it. Using bankruptcy reorganization to move from state regulation to federal regulation is not necessarily improper. Proponents have argued without dispute that there is nothing illegal about a disaggregated utility structure, and that if PG&E had founded its business as several separate entities, or if another entity did so now, those entities would be outside the Commission's jurisdiction to the same extent as proposed under the Plan. Moreover, among the purposes of the Bankruptcy Code is giving debtors a fresh start. *Perez*, 402 U.S. at 649. Applied to corporate debtors the fresh start might entail restructuring their business. The court believes, however, that for Proponents to preempt state law barring disaggregation, they will need to rely on more than just the general policy of Chapter 11 favoring reorganizations. They must show that enforcing such state law would be an "obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws." *Baker & Drake*, 35 F.3d at 1353. The court does not presently decide whether Proponents must show that disaggregation is necessary to pay past debts, or to avoid incurring future significant debts, or any other standard. These are matters to be shown in general in a revised Disclosure Statement, and to be proven at trial.

Another non-economic consideration raised by several objectors is that there are potential environmental impacts from disaggregation.[22] How disaggregation itself would have

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[22] It is not clear that environmental impacts are matters of public "safety" or even public "health," although at some point environmental degradation no doubt would have serious health consequences for some or all of us. As noted above, however, preemption is particularly unlikely for environmental matters. *Midlantic*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755;

any adverse environmental impact is not immediately obvious. As Proponents point out, the disaggregated entities will still be subject to all the usual zoning and environmental regulations. The objectors argue, however, that disaggregation will remove some lands from the Commission's jurisdiction, that FERC has previously defined its mandate to exclude environmental concerns, that even if FERC were to consider environmental issues most of PG&E's current land holdings will not be subject to either the Commission's or FERC's jurisdiction, and that under California law this would be sufficient to block PG&E's proposed disaggregation or perhaps condition it on some level of environmental commitments.[23] The court finds merit in both arguments. The court agrees with *PSNH* that Proponents

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Fireman's Fund, 271 F.3d at 932-933 ("highly deferential" to local environmental regulation). *See also Baker & Drake*, 35 F.3d at 1354 (noting non-economic purposes of state regulation other than health and safety).

[23] The Plan and Disclosure Statement include assurances that PG&E, the LLCs and Land Holdings (another entity to be formed by Proponents after confirmation) will remain subject to any applicable environmental laws and regulations and that Proponents have no intention of changing their environmental policies and standards. See Plan § 7.8 (Regulatory Issues") at 74:5-9 and Disclosure Statement §§ VI.D.4 ("Land Ownership") and L. ("Regulatory Impact of the Plan") at 99:1-3 and 126:16-127.19. The court notes that these commitments do not necessarily bar all development of all land forever, nor is it clear that they must do so to comply with state law. Unlike most other land-holders PG&E has been subject to additional restrictions because of the Commission's jurisdiction over it. The Commission has argued that this is appropriate because, as part of the "regulatory compact," California ratepayers subsidized PG&E's acquisition and non-development of its land. The merits of this argument are not before the court, and the issue is described here only to clarify that the alleged environmental consequences of disaggregation do not render the Plan facially unconfirmable.

would have a more difficult preemption argument if they intended to block "ongoing regulatory requirements." *PSNH* 108 B.R. at 890 n. 38, 891 and 893 (Appendix P 5). On the other hand, the court rejects any argument that preemption is less serious because conceptually it occurs only at the instant of disaggregation. Proponents attempt to distinguish Baker & Drake by arguing that there the Nevada law on point did not impede the event of reorganization, but only the post-confirmation operations of the reorganized debtor. Here they emphasize that once the Plan is confirmed and becomes effective, Reorganized Debtor, the LLC's and all other affiliated entities will comply fully with applicable law just as PG&E is doing now as required by 28 U.S.C. § 959(b). Their theory is that only a single event – what their counsel calls the "big-bang" of confirmation – will be exempt from state law that would otherwise prohibit the Restructuring Transactions. The court rejects this theory. State law applies, or it is preempted. It is not a temporal thing, suspended only for a moment. Therefore, the environmental objections do not render the Plan facially unconfirmable but they may be relevant to preemption issues at the confirmation hearing.

In sum, the court cannot agree with *PSNH* to the extent it suggests a sweeping mandate to preempt whatever plan proponents (and perhaps a single bankruptcy judge) decide should be preempted. The court has found no other cases that suggest such an open-ended preemption. Rather, in all those cases the scope of preemption is limited either by the description of the law being displaced or by the nature of the preemptive statute.

Proponents' other leading case is *FCX*. *FCX* held that state law restrictions on the surrender of collateral known as "patronage certificates" were preempted by the Bankruptcy Code. *FCX*, 853 F.2d 1149. In distinguishing a decision that reached the opposite conclusion (*Calvert* v. *Bongards Creameries* (*In re Schauer*), 62 B.R. 526 (Bankr. D. Minn. 1986), *aff'd*, 835 F.2d 1222 (8th Cir. 1987)), *FCX* stated:

> *In re Schauer*, however, is distinguishable on two grounds. First, the trustee there did not rely on § 1123(a)(5)(D), but [instead on] § 363(b)(1) and § 704 . . . . Second, and more importantly, § 363(b)(1) and § 704 are substantively different from § 1123(a)(5)(D). . . . § 363(b)(1) and § 704 are no more than "enabling statutes that give the trustee the authority to sell or dispose of property if the debtor[ ] would have had the same right under state law." . . .
>
> In contrast, § 1123(a)(5) is an empowering statute. As stated by Collier: "The alternatives set forth in § 1123(a)(5) are self executing. That is, the plan may propose such actions notwithstanding nonbankruptcy law or agreements." 5 *Collier on Bankruptcy* P 1123.01, at 1123-10. Section 1123(a)(5)(D) then does not simply provide a means to exercise the debtor's pre-bankruptcy rights; it enlarges the scope of those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate.

FCX, 853 F.2d at 1154-55.[24]

The court disagrees with *FCX* to the extent, if any, that it supports an unfettered right to dispose of assets without regard to state law as part of a plan pursuant to Section 1123(a)(5)(D). The court in *FCX* was not faced with anything similar to relief sought by Proponents in this case, and did not discuss the ramifications of such a reading. In fact, the debtor did not even seek to sell or transfer the patronage certificates to a third party. It proposed – and was allowed – to force a

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[24] The *Collier* treatise provides no analysis or discussion of the issues and simply cites a few cases that also have no meaningful discussion for present purposes. *See also PSNH*, 108 B.R. at 883 n. 25 (no meaningful discussion in cases other than *FCX*).

creditor to accept collateral in violation of that creditor's own articles of incorporation. *FCX*, 853 F.2d at 1149.

In addition, the court notes that debtors are already empowered to sell property, notwithstanding some nonbankruptcy laws, pursuant to Sections 363(f) and 1129(b)(2)(A)(ii). Those sections have carefully worked-out limitations on sales (such as requiring that any liens attach to the proceeds of sale and that sales be subject to credit bids). *See* 11 U.S.C. §§ 363(f) and 1129(b)(2)(A)(ii). Therefore, it is not necessary to rely on Section 1123(a)(5)(D) as an empowering statute for any sales of the type that Congress explicitly authorized. Moreover, even if Section 1123(a)(5)(D) were an empowering statute, it would be inappropriate to interpret it in such a way as to ignore the carefully limited powers in Sections 363(f) and 1129(b)(2)(A)(ii).[25]

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[25] The court notes that other sections of the Bankruptcy Code, or nonbankruptcy law, appear to be more appropriately tailored sources of empowerment for the other paragraphs of Section 1123(a)(5). For example, Paragraph (G) of Section 1123(a)(5) suggests that one means of implementing a plan is to provide for "curing or waiving a default." 11 U.S.C. § 1123(a)(5)(G). The curing and waiving powers are covered either by Section 1129(a)(8)(A) (class accepts a plan, thereby waiving defaults) or Section 1129(a)(8)(B) (class is unimpaired because defaults are cured). Moreover, those powers are more precisely tailored to this purpose: Sections 1124(2)(A) and 365(b)(2)(D) specify that the "cure" need not include, for example, any "penalty rate." *See* 11 U.S.C. §§ 365(b)(2)(D), 1124(2)(A), and 1129(a)(8)(B).

Another example is that Paragraph (H) of Section 1123(a)(5) provides for "extension of a maturity date or a change in an interest rate or other term of outstanding securities." 11 U.S.C. § 1123(a)(5)(H). These powers are covered by Sections 506(b), 1129(a)(7), 1129(a)(8)(A) and 1129(b)(2)(B), which collectively tailor such powers to assure that the interest rate provides adequate present value, or else that the affected class consents or no junior

The *PSNH* decision states that "*FCX* apparently is the only case that has any meaningful discussion of the provisions of 1123(a)(5) for present purposes." *PSNH*, 108 B.R. at 883 n. 25. Proponents have not cited any other case.[26] Therefore, the applicable cases reinforce the court's view, based on the statutory language, that Section 1123(a)(5) does not empower Proponents to engage in wholesale preemption of nonbankruptcy law through their Plan. For all of these reasons, Proponents' reliance on *PSNH* and *FCX* is insufficient to justify the full scope of relief they seek. At this stage, however, the court cannot say as a matter of law that Proponents will be unable to establish implied preemption of otherwise applicable state laws at the confirmation hearings.

d. Other Bankruptcy Preemption Statutes

Here, Proponents urge this court to adopt an interpretation of Section 1123(a)(5) that would allow plans and orders confirming plans – the terms of which are not codified or even known until a plan and disclosure statement are filed – to preempt all state law. Generally, unlike

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class receives or retains anything under the plan on account of their claims or interests.

Similarly, nonbankruptcy law such as state and federal antitrust laws may place carefully tailored limits on mergers under Paragraph (C) of Section 1123(a)(5).

[26] *Cf. Great Western Bank & Trust* v. *Entz-White Lumber and Supply, Inc.* (*In re Entz-White Lumber and Supply, Inc.*), 850 F.2d 1338, 1340 n. 3 (9th Cir. 1988) (holding that debtor is entitled to cure default using pre-maturity interest rate pursuant to Section 1124(2), but commenting in dicta that Section 1123 "would appear to allow debtors to cure this type of default even if a party with a claim cured in this way would be impaired under § 1124") and *CityBank* v. *Udhus* (*In re Udhus*), 218 B.R. 513 (9th Cir. BAP 1998) (concept of "cure" used throughout bankruptcy code nullifies default, so cure referred to in Section 1123(a)(5)(G) does not require payment of default interest even where creditor is impaired).

Proponents' interpretation of Section 1123(a)(5), other portions of the Bankruptcy Code which preempt state law are self-limiting in scope. In other words, the provisions explicitly describe and set the parameters of state law being exempted, or specifically set forth the nature and scope of the statutory bankruptcy law which preempts the state law. They do not contemplate having parties and the court "make" the preemptive law.

For example, Section 1125(d) provides that a bankruptcy court's determination regarding the adequacy of a disclosure statement is not governed by otherwise applicable non-bankruptcy law. The preemption is not open-ended. Similarly, Section 1124(2) provides that, notwithstanding any law that entitles a claim or interest to receive accelerated payment upon default, a plan may cure the default and reinstate the maturity of the claim or interest. *See Entz-White*, 850 F.2d 1338. The statute specifically defines the nature of those state laws being preempted.

Likewise, Section 1142(a) defines the type of state law being pre-empted: those laws relating to financial condition. Section 1142(a) provides that "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition," the debtor or reorganized entity shall carry out the plan and shall comply with orders of the court. Section 1145, which pertains to specified offers or sales of securities under a plan, exempts (with certain exceptions) debtors and plan proponents from complying with state and local laws requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in a security.

Section 541(c)(1) provides that an "interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in . . . applicable nonbankruptcy law" that restricts the transfer of such interest or that is conditioned on the insolvency or financial condition of the debtor. Section 363(b)(1) provides that a trustee may

sell, use or lease property "notwithstanding any provision . . . in applicable law that is conditioned on the insolvency or financial condition of the debtor . . ."). Section 365(e)(1) and (f)(3) allow a trustee to assume or assign leases and executory contracts notwithstanding otherwise applicable law that purports to terminate the contract upon such an assumption or which purports to terminate the contract due to the financial condition of the debtor. Section 545 allows a trustee to avoid the fixing of certain statutory liens. Section 546(c) places limitations on a seller's statutory right to reclaim goods.

In each of these cases, the scope of the preemption is limited either by the description of the law being displaced or by the nature of the preemptive bankruptcy statute. None of these provisions allows a plan or order or law of undefined scope to preempt any and all laws inconsistent with its provisions.

e. Conclusion as to Section 1123(a)(5)

For the foregoing reasons, the court rejects Proponents' interpretation of Section 1123(a)(5) as allowing it to disaggregate with unfettered preemption of any contrary nonbankruptcy law. The scope of preemption, if any, must be considered in light of the nonbankruptcy laws at issue.

3. Necessary Modifications To Disclosure Statement

At the beginning of this Memorandum Decision the court reminded Proponents that the Rescheduling Order directed them to describe specifically laws they sought to preempt and the governmental units affected by such preemption. Now that the matter has been fully briefed, argued and analyzed, and Proponents' express preemption theory rejected, the court believes it appropriate to expand upon the Rescheduling Order and give Proponents some direction as to minimum disclosures necessary to set the stage for their implied preemption confirmation contest.

It would be burdensome, of course, to require Proponents to fill a revised Disclosure Statement with a detailed explanation of each and every law, regulation, decision,

ruling, ordinance or other authority Proponents believe stand in the way of confirmation, and further to require Proponents to set forth their entire evidentiary support for their position. That being said, the court will require Proponents to state in summary fashion the reasons why they believe it necessary for each of the Public Utilities Code sections referenced in section III, the gain on sale rules, and Ordering Paragraph 5 of Commission Decision D.01-12-017, to be preempted. Proponents do not need to include specific details at this time. It is sufficient if they prepare the revised disclosures as they would prepare a trial brief, showing what ultimate facts will be proven to lead the court to find that the application of those laws to the facts of PG&E's proposed reorganization are economic in nature rather than directed at protecting public safety or other noneconomic concerns, and that those particular laws stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress and the Bankruptcy Code.

B. Sovereign Immunity Implications

1. As noted in Section III, several provisions of the Plan seek an affirmative ruling of this court under Section 1123 that approval of various state and local governmental units is not required to carry out many of the contemplated transactions. The Plan also seeks an injunction prohibiting members of the Commission and officials of the State from taking certain actions.[27]

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[27] Apart from the sovereign immunity issues discussed in this Memorandum Decision, at a prior hearing the court considered whether injunctive or declaratory relief could be sought as part of the confirmation process or, as the Commission, the State and others contended, required commencement of an adversary proceeding under Part VII of the Federal Rules of Bankruptcy Procedure. The court accepted Proponents' arguments that Rule 7001(7) authorizes obtaining an injunction or other equitable relief as part of a Chapter 11 plan, without the need for an adversary proceeding. The court's decision on that procedural point has not

In addition, the Plan seeks to exempt PG&E from its statutory obligation to fund the net open position to provide sufficient electric power to serve the public. The Commission argues that this constitutes an attempt to recover money from the State. That duty includes purchasing and paying for power from wholesale suppliers when the demand for power by ratepayers exceeds the utility's own generation capacity. Whether or not the State is obligated to pay for power purchased by the California Department of Water Resources to cover PG&E's net open position, the Plan – while it may attempt to prevent PG&E from having to pay certain amounts of money – does not constitute an impermissible attempt to recover money from the State. This is much different from Proponents' attempt to have the Plan prohibit the Reorganized Debtor from assuming the net open position or prohibiting the Reorganized Debtor from accepting, directly or indirectly, an assignment of Department of Water Resources contracts. For the Plan to restrain the Reorganized Debtor from doing such things is the functional equivalent of having the Plan declare that the Reorganized Debtor does not have to comply with certain applicable provisions of nonbankruptcy law. These matters are dealt with in the court's decision concerning implied preemption, supra.

The Plan seeks equitable and injunctive relief. As such it constitutes ". . . the prosecution, or pursuit, of some claim, demand, or request.'" *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821). More recently than the early 1800s, the Ninth Circuit held that suits requesting nonmonetary relief do not divest the state of its immunity. *Mitchell* v. *Franchise Tax Board* (*In re Mitchell*), 209 F.3d 1111, 1116 (9th Cir. 2000), quoting *Seminole Tribe of Florida* v. *Florida*, 517 U.S.

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been reduced to an order to date but it can and will be dealt in any order approving a disclosure statement or any order confirming a plan of reorganization.

44, 58 (1996) ("The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury"). In *Mitchell*, the bankruptcy court, the Bankruptcy Appellate Panel[28] and the Ninth Circuit determined an adversary proceeding commenced by a debtor to be a "suit" for Eleventh Amendment purposes. And in *NVR Homes, Inc.* v. *Clerks of the Circuit Courts* (*In re NVR, LP*), 189 F.3d 442 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), the court extended the application of this principle to a contested matter commenced against state agencies by motion under Fed. R. Bankr. P. 9014. Rule 7001(7) takes out of the definition of "adversary proceeding" a proceeding to obtain an injunction or other equitable relief when a Chapter 11 plan provides for such relief. But permitting such relief without an adversary proceeding does not change the result for sovereign immunity purposes. Fed. R. Bankr. P. 9014 deals with contested matters "not otherwise governed by [Federal Rules of Bankruptcy Procedure] wherein relief shall be requested by motion." There can be no question but that the attempt to obtain declaratory or injunctive relief through the Plan confirmation process is subject to a properly invoked sovereign immunity defense.

2. Most of Proponents' arguments regarding sovereign immunity are premised upon the notion that the requested relief is proper under *Ex Parte Young*, 209 U.S. 123 (1908). This court has joined countless others in relying on *Ex Parte Young* in holding that federal courts can take actions against state officials acting in their representative capacity if they are violating federal law. *See Pacific Gas and Electric Co.* v. *California Public Utils. Comm'n* (*In re Pacific Gas and Elec. Co.*), 263 B.R. 306, 314 (Bankr. N.D. Cal. 2001). With that principle as a starting point, Proponents would have the court

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[28] See *Mitchell* v. *Franchise Tax Board* (*In re Mitchell*), 222 B.R. 877 (9th Cir. BAP 1998), *aff'd*, 209 F.3d 1111 (9th Cir. 2000).

believe that an injunction is proper because officials of the Commission or the State might violate federal law – an order confirming a plan of reorganization – sometime in the future.

The Ninth Circuit has held in *Goldberg* v. *Ellett* (*In re Ellett*), 254 F.3d 1135 (9th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3514 (U.S. 2002), that discharge orders are binding on states notwithstanding their avoidance of bankruptcy court jurisdiction, whether or not the result would prevent a state from collecting monies otherwise owed to it. *Ellett*, 254 F.3d at 1141, *citing Mitchell*, 209 F.3d at 1117. Authorities from other circuits agree that there are no sovereign immunity implications when the bankruptcy court exercises jurisdiction over the res of the bankruptcy estate. *Texas* v. *Walker*, 142 F.3d 813 (5th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *State of Maryland* v. *Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997) (confirmation order not a suit against state; state not named as defendant or served with process mandating appearance; order confirming plan, including a provision interpreting Bankruptcy Code § 1146(c), derived not from jurisdiction over the estate or other creditors, but rather from the jurisdiction over debtors and their estates).[29] *See* Section

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[29] Lurking beneath the surface of the instant dispute is the intimation by Corporation's counsel that officials of the Commission or the State will simply take the position that they may ignore an order confirming a plan of reorganization, and thus they will be free to enforce state law based upon the inability of this court to grant *in rem* relief that preempts such state law. For example, he stated (without offering any evidence) that they will "impute" things when it comes to rate making. The cases cited in the text contrast an attempt to obtain affirmative relief from a sovereign with a bankruptcy court exercising traditional *in rem* jurisdiction over the debtor and its assets. That *in rem* jurisdiction is binding. Stated otherwise, if an order confirming the Plan, or any similar plan found to preempt specific state laws and regulations, is entered, the bankruptcy court must take the position that any attempt to circumvent the effectiveness of such an order will be met

1141(a) (confirmed plan binds "any creditor", and Section 1142(a) (debtor and ". . . any entity organized . . . for the purpose of carrying out the plan shall carry out the plan . . . .").

The Ninth Circuit visited the *Ex Parte Young* exception recently in *Duke Energy Trading and Marketing, LLC* v. *Davis*, 267 F.3d 1042 (9th Cir. 2001). There again, as only a few weeks earlier in *Ellett*, the court upheld the ability of the trial court to enjoin a violation of federal law. Similarly, a threatened violation of federal law can be restrained as well. *Agua Caliente Band of Cahuilla Indians* v. *Hardin*, 223 F.3d 1041 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

The problem with their reliance on *Agua Caliente*, *Duke Energy*, *Ellett* and similar cases at the present time is that Proponents can point to no ongoing or threatened violation of federal law. They treat the opposition of the Commission and the State to approval of the Disclosure Statement (based upon sovereign immunity, preemption and numerous other grounds) as a presumed threat just as PG&E did when it sought to enjoin the Commission early in this case and was turned away, in part because it could not point to any actual or threatened violation of federal law. *See Pacific Gas and Elec.*, 263 B.R. at 323. Absent such a real threat or an ongoing violation, *Ex Parte Young* is not available to support injunctive relief through confirmation. Thus the Plan as drafted cannot overcome the sovereign immunity objection.

Finally, State and Commission argue that the Plan is so pervasive a threat to sovereign immunity that *Ex Parte Young* is not available based upon the exception found in *Idaho* v. *Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997). In view

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with an injunction as authorized under *Ex Parte Young*, just as occurred in *Ellett*. This bankruptcy court will do exactly that. Otherwise the integrity of the federal court and its order will be undermined. Thus counsel's warning that the state officials are "bound to take the plan seriously" is unquestioned.

of the court's rejection of Proponents' wholesale express preemption theory and its refusal to apply an *Ex Parte Young* exception to the sovereign immunity defense at this time, it is unnecessary to reach this issue.

3. Proponents point to several instances of conduct during this Chapter 11 case that amount to a waiver of sovereign immunity by the Commission and the State. As noted in footnote 6, waiver of sovereign immunity was not an issue the court was willing to consider at the January 25, 2002 hearing. If Proponents believe that the provisions of the Plan seeking injunctive or declaratory relief can be justified because of a waiver of sovereign immunity, then the revised disclosure statement should state with specificity the facts suggesting such a waiver. The issue will be tried as part of confirmation.

VI. Disposition

This Memorandum Decision rejects outright Proponents' across-the-board, take-no-prisoners preemption strategy in the Plan and Disclosure Statement. If Proponents believe the court is in error, they are entitled to attempt to seek review on appeal. To that end, the court will, if requested, enter an order disapproving the Disclosure Statement (or the latest version of it) for the reasons stated herein. Approval of a disclosure statement is not a final order for purposes of appeal. *Everett* v. *Perez* (*In re Perez*), 30 F.3d 1209, 1217 (9th Cir. 1994), *citing Texas Extrusion Corp.* v. *Lockheed Corp.* (Matter of Texas Extrusion Corp.), 844 F.2d 1142, 1154 (5th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988). Denial of approval of a disclosure statement is likewise interlocutory. *Asbestos Claimants* v. *Aetna Casualty & Surety Co.* (*In re The Wallace & Gale Co.*), 72 F.3d 21, 25 (4th Cir. 1995) ("the bankruptcy court's order denying approval of the disclosure statement was interlocutory"), *citing Adams* v. *First Fin. Dev. Corp.* (*In re First Fin. Dev. Corp.*), 960 F.2d 23, 26 (5th Cir. 1992). Any appeal will be discretionary with the District Court or the Bankruptcy Appellate Panel (28 U.S.C. § 158(a)(3) & (b))

and the court will not impede Proponents if they wish to attempt an appeal of an interlocutory order. In the alternative, the court will consider a proper request to certify the order disapproving the Disclosure Statement under Fed. R. Civ. P. 54(b), made applicable by Fed. R. Bankr. P. 7054(a) and Fed. R. Bankr. P. 9014.

Regardless of any decision about an appeal from this decision, the court and parties in interest need to know Proponents' intentions. Will they eliminate the provisions of the Plan and Disclosure Statement that implicate sovereign immunity? Will they amend the Plan to eliminate the express preemption provisions and amend the Disclosure Statement to meet their prima facie burden of disclosure and proceed to a confirmation hearing in an attempt to carry their burden to show implied preemption as the court recognizes as possible? Will they submit an alternative plan to replace the Plan and Disclosure Statement?

Apart from the foregoing – and unrelated to the merits of the court's decision here – the Commission has stated its intention to file its own plan of reorganization.[30] PG&E is entitled to respond to Commission's term sheet.

Accordingly, the following schedule will apply:

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[30] On February 1, 2002, this court entered its Order Further Extending Exclusivity Period For Plan of Reorganization, and on February 3, 2002, its Amended Order Further Extending Exclusivity Period For Plan of Reorganization ("Exclusivity Order"). By that Exclusivity Order the court extended PG&E's exclusivity under Section 1121(c)(3) to June 30, 2002, except for the Commission. The Commission has until February 13, 2002, to file and serve a term sheet regarding its contemplated plan of reorganization, specifying (i) the proposed classification of all claims in interest; (ii) the proposed treatment of all claims in interest; (iii) the proposed means for implementation of any such plan (including, without limitation, specifics how particular claims will be satisfied, reinstated or refinanced); and (iv) a time-line for proposing and seeking approval of the plan it contemplates.

A. No later than February 21, 2002, PG&E is to:

1. File and serve its response to Commission's term sheet. The response is to be limited to twenty (20) pages.[31] If Commission does not file the term sheet by the February 13, 2002, deadline, PG&E's counsel may submit a declaration of noncompliance together with an order that will supplement the Exclusivity Order, terminating Commission's right to file a term sheet and extending all plan exclusivity until June 30, 2002.

2. File and serve a statement of its (and Corporation's) intentions as to the future of the plan and disclosure statement process in this Chapter 11 case, addressing the questions raised above.

3. Submit a form of order denying approval of the Disclosure Statement "for the reasons stated" in this Memorandum Decision if that is its desire.

4. File and serve any request for interlocutory certification of the order denying approval of the Disclosure Statement that it wishes to have this court enter.

B. The papers described in the foregoing paragraph A are to be served upon the United States Trustee, counsel for the Committee, and counsel for all parties who filed oppositions to PG&E's Motion For Order Further Extending Exclusivity Period For Plan Of Reorganization and/or any objections to the adequacy of the Disclosure Statement based upon preemption and sovereign immunity grounds.

C. Any party who objected to the adequacy of the Disclosure Statement on the basis of preemption and sovereign immunity may present any opposition it has to any request PG&E may file in accordance with paragraph A.4 for certification of any order denying approval of the Disclosure Statement at the hearing mentioned below.

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[31] The Committee may also file its response to the Commission's term sheet, subject to the same page limitations.

D. The court will conduct a hearing on February 27, 2002, at 1:30 P.M., to consider all matters addressed in the foregoing. No papers other than those requested are to be filed in connection with that hearing.

Dated: February 7, 2002
Dennis Montali
United States Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-16990
D.C. No. CV-02-01550-VRW

PACIFIC GAS AND ELECTRIC COMPANY, a California corporation; PG&E CORPORATION,

Plaintiffs – Appellees,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. California Dept of Toxic Substances Control, Central Coast Regional Water Quality Control Board, Colorado River Basin Regional Water Quality Control Board, Lohontan Regional Water Quality Board, Central Valley Regional Water Quality Control Board, San Francisco Bay Regional Water Quality Control Board, North Coast Regional Quality Control Board, California Dept. Fish and Game, California Dept. of Forestry and Fire Protection, California Dept. Water Resources, California Environment Protection Agency, California Highway Patrol, California Dept. of Education, Bay Conservation Development Commission, Resources Agency, State Lands Commission California Dept. of Parks and Recreation, California Dept. General Services, California Coastal Commission; PEOPLE OF THE STATE OF CALIFORNIA, ex rel. California Dept. of Transportation; CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA HYDROPOWER REFORM COALITION; CALIFORNIA PUBLIC UTILITIES COMMISSION,

Defendants – Appellants,

and,

CITY OF REDWOOD CITY; CALIFORNIA COUNTIES OF ALAMEDA, FRESNO, KERN, SACRAMENTO, SAN LUIS OBISPO, SANTA BARBARA, SANTA CLARA,

SISKIYOU, SONOMA, AND THE CITY AND COUNTY OF SAN FRANCISCO; UNITED STATES OF AMERICA, on behalf of the US Environmental Protection Agency; OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Defendants.

No. 02-80113

D.C. No. CV-02-01550-VRW

PEOPLE OF THE STATE OF CALIFORNIA, ex. rel. California Dept Transportation; CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA HYDROPOWER REFORM COALITION; CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioners,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,

Respondent.

ORDER

Before: HAWKINS, W. FLETCHER, Circuit Judges, and KING,* Senior Judge.

The panel has voted to deny the petition for rehearing. Judges Hawkins and W. Fletcher have voted to deny the petition for rehearing en banc; and Judge King so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed December 10, 2003, are DENIED.

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* The Honorable Samuel P. King, Senior District Judge for Hawaii, sitting by designation.

Supreme Court, U.S.
FILED
SEP 27 2004
OFFICE OF THE CLERK

(2)

No. 04-131

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC CO. AND PG&E CORP.,

Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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September 27, 2004

QUESTIONS PRESENTED

1. Does this Court lack subject matter jurisdiction to decide the question allegedly presented in the petition because petitioner Pacific Gas and Electric Co. ("PG&E") has now implemented a confirmed reorganization plan based on a settlement, and any dispute over PG&E's prior and now superseded proposed reorganization plan of December 19, 2001, is therefore moot?

2. Does the "notwithstanding" clause in section 1123(a) of the Bankruptcy Code, 11 U.S.C. § 1123(a), expressly preempt all nonbankruptcy laws—including civil and criminal laws, and federal, state, and local laws—that are applicable to implementation of a confirmed plan of reorganization or liquidation under chapter 11?

RULE 29.6 STATEMENT

No respondent is a nongovernmental corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

In the interlocutory decision below, the Ninth Circuit rejected petitioners' theory that through an inconspicuous "notwithstanding" clause enacted in 1984 as a technical amendment to the Bankruptcy Code, Congress imposed mandatory, automatic, and self-executing preemption of all nonbankruptcy federal, state, and local regulatory laws applicable to the implementation of a confirmed chapter 11 plan. After the Ninth Circuit issued its decision, the bankruptcy case underlying the decision was settled. That settlement has resulted in a confirmed reorganization plan for petitioner PG&E that does not raise the question allegedly presented by the petition and that does not preempt regulatory laws. Although two appeals from the order confirming the settlement plan remain pending, PG&E has completed implementation of that plan.

Certiorari should be denied because the dispute decided by the Ninth Circuit is likely to become indisputably moot during the pendency of any review by this Court, and may well be moot now. In any event, the Ninth Circuit's decision does not conflict with any decision of this Court or any other court of appeals, and petitioners identify no other plausible reason for certiorari.

STATEMENT OF THE CASE

1. Petitioner PG&E is a public utility that owns and operates facilities within the State of California used for the generation, transmission, and retail distribution of electricity and natural gas. Pet. App. 2. Respondent California Public Utilities Commission (the "Commission") is an agency of the State of California, established by the California constitution, with broad regulatory authority over California public utilities, including PG&E. *See* CAL. CONST. art. XII; CAL. PUB. UTIL.

CODE § 701 (West 2004). The other twenty-one respondent agencies of the State of California administer some, but not all, of the state laws protecting public safety, health, and welfare that PG&E sought to preempt.

Traditionally, rates charged by PG&E were based on PG&E's cost of service. That rate methodology generally allows recoupment of reasonable costs and an opportunity to earn a reasonable return on the utility's rate base.[1] In 1996, however, the California legislature enacted a program of limited deregulation of California electric utilities. As part of that program, retail rates were temporarily frozen at levels that were expected to enable existing utilities to recover certain "stranded costs"—i.e., transition costs related to certain past uneconomic investments and contracts.[2]

Beginning in the summer of 2000, when the rate freeze was still in effect, prices for wholesale electricity rose dramatically and dangerous power disruptions occurred in California. As part of California's deregulatory program, electric utilities had been given incentives to sell generating facilities.[3] Sales of such facilities to out-of-state merchant generating companies, the California executive and legislature concluded, had resulted in "price-gouging" by those companies, which in turn had led to "an unreliable supply of energy" and the danger of power outages. *See* 2001-2002 CAL. ASSEMBLY

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[1] *See In re PG&E*, Dec. 03-02-035, 2003 WL 548951, at *3 (Cal. Pub. Util. Comm'n Feb. 13, 2003).

[2] *See* Act of Sept. 24, 1996, ch. 854, § 10, 1996 Cal. Stat. 3678, 3698-3700 (codified in part as amended at CAL. PUB. UTIL. CODE §§ 367, 368(a) (West 2004)); *see also* Hon. Richard D. Cudahy, *Deregulation of Energy: Lessons from the West*, 54 ADMIN. L. REV. 333, 341 (2002).

[3] *See* Cudahy, *supra* note 2, at 341-42 & n.32.

J. 110-13 (State of the State address by Gov. Gray Davis). The California legislature accordingly amended section 377 of the California Public Utilities Code. *See* Act of Jan. 18, 2001, ch. 2, § 3, 2001-2002 Cal. Stat. 4, 7-8 (codified at CAL. PUB. UTIL. CODE § 377 (West 2004)). As amended, that section prohibits any owner of electric generation facilities in California from disposing of those facilities before 2006. The executive and legislative branches of the California state government took numerous other actions to meet the energy crisis.[4]

2. PG&E filed a chapter 11 petition on April 6, 2001. On December 19, 2001, PG&E submitted a proposed reorganization plan that called for PG&E's disaggregation into four new companies (the "Proposed Preemption Plan"). Those four new companies (the "Proposed Successor Companies") would have owned and operated, respectively, PG&E's generation, electric transmission, gas transmission, and retail distribution businesses. *See* Pet. App. 4a, 71a-72a. PG&E, as a unitary vertically integrated utility, would have ceased to exist.

Prior to PG&E's bankruptcy, the Commission was the principal regulator for PG&E's generation, intrastate gas transmission, and retail distribution businesses. After implementation of the Proposed Preemption Plan, the Commission—according to PG&E—would have had regulatory jurisdiction over only one of the four Proposed Successor Companies (the company that engaged in retail distribution).

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[4] *See* Cudahy, *supra* note 2, at 344-48. In support of their accusation of regulatory misfeasance against the Commission, petitioners cite only their own judicially untested allegations in their proposed disclosure statement. Pet. 3 (citing C.A. Supplemental Excerpts of Record 76-77, 96). Who was responsible for PG&E's bankruptcy was not the subject of findings in the courts below and is not relevant to the petition.

See Pet. App. 4a. On PG&E's view, the other three Proposed Successor Companies would have been subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission. *See id.* The result of the proposed plan—and, in respondents' view, a major purpose of the plan—would thus have been the permanent elimination of the Commission's regulatory jurisdiction over most of PG&E's businesses and operations.

Upon confirmation, PG&E's Proposed Preemption Plan purported to impose mandatory, automatic, and self-executing express preemption, pursuant to section 1123(a) of the Bankruptcy Code, of *all* state or local laws applicable to the plan, the transactions proposed in the plan, or the implementation of the plan, whether those state or local laws were identified in the plan or not. *See* Pet. App. 6a, 67a-68a. The California and local laws purportedly preempted by the Proposed Preemption Plan, had it been confirmed, would have included, among others,

- section 377 of the California Public Utilities Code, which prohibits the transfers proposed in the plan of PG&E's generation facilities, *see* Pet. App. 69a-70a;
- California regulatory laws requiring the Commission's prior approval for any proposed plan transactions, including transfers of PG&E's property and securities issuances, *see* CAL. PUB. UTIL. CODE §§ 701.5, 816-30, 851, 852, 854 (West 2004); Pet. App. 70a; C.A. E.R. 38-39;
- California laws requiring review of the potential environmental consequences of PG&E's disaggregation, *see* CAL. PUB. RES. CODE §§ 21065, 21100, 21151 (West 1996); CAL. PUB. UTIL. CODE § 851 (West 2004);

- any laws conferring discretion on any state or local agency to deny the assignments purportedly required by the plan of PG&E permits or licenses, *see* Pet. App. 68a-69a; and
- under certain circumstances, PG&E's fundamental duty under California law to supply all of its customers with electricity and natural gas, *see* Pet. App. 103a; C.A. E.R. 33-34.[5]

The "notwithstanding" clause of section 1123(a) refers to "nonbankruptcy law," which includes *federal* nonbankruptcy law. *Patterson* v. *Shumate*, 504 U.S. 753, 759 (1992). The logic of PG&E's position thus requires that federal nonbankruptcy laws applicable to chapter 11 plans be displaced to the same extent and in the same way as state and local laws.

As the United States stated in its *amicus* brief to the Ninth Circuit,

> PG&E's [Proposed Preemption Plan] did not categorically assert that federal laws governing the transfer of an asset, license or permit are . . . preempted. But its statements concerning the reorganization's impact are decidedly equivocal and plainly calculated to reserve the right to preempt those laws as well if the necessary federal approvals are not forthcoming.

Brief for United States as Amicus Curiae in Support of Vacatur and Remand, filed Nov. 14, 2002 ("U.S. Br.") at 9 (citing C.A. E.R. 41-42).

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[5] *See* CAL. PUB. UTIL. CODE §§ 451, 728, 761 (West 2004); *In re S. Cal. Edison Co.*, Dec. 01-01-046, 206 P.U.R. 4th 141, 142, 145-47, 2001 Cal. PUC LEXIS 113, at *1-2, *9-16 (Cal. Pub. Util. Comm'n 2001).

PG&E's Proposed Preemption Plan called for a change in ownership of PG&E's nuclear generating facility at Diablo Canyon, which required approval from the Nuclear Regulatory Commission. C.A. E.R. 26-27; *see* 42 U.S.C. §§ 2233-34; 10 C.F.R. § 50.80. The proposed plan called for a change in control over ownership interests in a public utility, which required approval by the Securities and Exchange Commission under the Public Utility Holding Company Act. C.A. E.R. 27; *see* 15 U.S.C. § 79i(a)(2), 79j(b). The proposed plan called for many transactions, such as the transfer of licenses to operate hydroelectric facilities, requiring approval by the Federal Energy Regulatory Commission. C.A. E.R. 18-19, 23, 26, 31; *see* 16 U.S.C. §§ 801, 824b.

3. Numerous parties objected to PG&E's Proposed Preemption Plan on the ground that the proposed plan unlawfully sought express preemption of regulatory laws applicable to plan implementation. Those objectors included the Commission; various other agencies of the State of California charged with administering California regulatory laws that might have been subject to purported preemption under the Proposed Preemption Plan; the remaining respondents here; and the United States. Pet. App. 64a.

The bankruptcy court disapproved PG&E's Proposed Preemption Plan to the extent it relied on express preemption under the "notwithstanding" clause of section 1123(a). The bankruptcy court observed that section 1123(a)(5) "can be read simply as a directive to the plan proponent about what must go into the plan." Pet. App. 80a. On this view, the "notwithstanding" clause would displace nonbankruptcy law (and any private rights enforceable under nonbankruptcy law) that were "otherwise applicable" to the *contents* of a plan, which is the subject addressed by the passage immediately following the "notwithstanding" clause in section 1123(a)(5).

The bankruptcy court noted that legislative history described the "notwithstanding" clause as a "stylistic" addition with the following purpose: "This amendment makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section . . . ." Pet. App. 87a (quoting H.R. REP. NO. 96-1195, at 22, 122-23 (1980)).

In the bankruptcy court's view, PG&E's interpretation would lead to absurd results that Congress could not have intended, such as authorizing a debtor, acting pursuant to a plan, to "dump toxic wastes (notwithstanding environmental laws and Supreme Court precedent)." Pet. App. 81a (referring to *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (1986)). The bankruptcy court

> reject[ed] the notion that Congress, without a hint in the legislative history, in a section of the Bankruptcy Code titled "Contents Of Plan," and using words calling for "adequate means for the Plan's implementation," intended to permit a debtor's plan—confirmed by a bankruptcy judge (not by a legislative act, as in most preemption situations)—to obliterate a whole area of jurisdiction and authority traditionally left to state law.

Pet. App. 84a-85a (footnote omitted).

4. On appeal, the district court reversed. The district court held that "[n]onbankruptcy laws otherwise applicable to the 'restructuring transactions necessary to an effective and feasible reorganization' are expressly preempted by the bankruptcy code." Pet. App. 62a (citation omitted).

The district court recognized that its interpretation of section 1123(a) potentially authorized the displacement of federal law, as well as state and local law. The district court suggested, for example, that it might not be "undesirable" for a

debtor to be able to consummate a merger pursuant to a reorganization plan, even if the merger would otherwise be forbidden by "§ 7 of the Clayton Act or some analogous state law." Pet. App. 49a-50a.

5. Respondents appealed to the Ninth Circuit, where the United States filed an *amicus* brief opposing PG&E's position. As the United States explained,

> the [district court's] holding suggests that the bankruptcy court would have statutory authority, at the later stages of this very case, to override the permitting, licensing, or regulatory decisions of environmental agencies, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, or the Nuclear Regulatory Commission if any of these governmental decisions interfere with implementation of the debtor's plan of reorganization.

U.S. Br. at 18-19; *see also* Pet. App. 7a. "Section 1123(a)(5) of the Bankruptcy Code does not authorize this wholesale displacement of other federal and state law." U.S. Br. at 19. The United States concluded that "[t]he district court . . . erred in construing section 1123(a)(5) to expressly preempt nonbankruptcy law." *Id.* at 20. In the view of the United States, the bankruptcy court had correctly interpreted the "notwithstanding" clause to expressly preempt state laws "that might purport to dictate the contents of a reorganization plan or the conditions under which the debtor may submit a reorganization plan for further consideration." *Id.* at 27.

A unanimous panel of the Ninth Circuit reversed the decision of the district court. The Ninth Circuit rejected petitioners' view of the "notwithstanding" clause as expressly preempting all nonbankruptcy laws applicable to the implementation of a chapter 11 plan. *See* Pet. App. 1a-29a. The Ninth Circuit found that

> the addition of the "notwithstanding" clause to § 1123(a) was merely a clarification and confirmation of the preemptive effect of a reorganization plan that already existed under the 1978 Bankruptcy Code. That preemptive effect, expressly stated in the "notwithstanding" clause of § 1142(a), was limited to otherwise applicable nonbankruptcy laws "relating to financial condition."

Pet. App. 3a. The Ninth Circuit's decision was guided by the traditional tools of statutory construction, as well as the general presumption requiring a narrow construction of federal statutory provisions preempting state law, and the further presumption against construing the Bankruptcy Code to preempt state regulatory law.

6. Following the bankruptcy court's interlocutory decision below, PG&E proposed an amended reorganization plan that continued to seek PG&E's disaggregation, but that purported to rely on implied preemption to oust state and local law.[6] During the pendency of the appeals described above in the district court and the Ninth Circuit, litigation ensued in the bankruptcy court concerning PG&E's amended proposed plan and a competing proposed plan submitted by the Commission that did not call for disaggregation.

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[6] [Proposed] Plan of Reorganization for PG&E dated Apr. 19, 2002, Docket Entry No. 6053, *In re PG&E*, No. 01-30923 DM (Bankr. N.D. Cal.); *see In re PG&E*, 304 B.R. 395, 399 (Bankr. N.D. Cal. 2004), *appeal dismissed sub nom. Lynch* v. *Cal. Pub. Util. Comm'n*, 311 B.R. 798 (N.D. Cal. 2004), *appeal docketed*, No. 04-16493 (9th Cir. July 29, 2004), *and appeal docketed sub nom. City of Palo Alto* v. *PG&E*, No. 3:04-cv-00727-VRW (N.D. Cal. Feb. 23, 2004).

On June 19, 2003, PG&E and the Commission's staff announced a proposed settlement that provided for a new proposed reorganization plan for PG&E (the "Settlement Plan"). The Settlement Plan did not call for disaggregation of PG&E or preemption of any laws based on section 1123(a). On December 18, 2003, the Commission, by a vote of three commissioners in favor and two opposed, approved the settlement agreement that provided the basis for the Settlement Plan.[7] The bankruptcy court issued an order confirming that plan on December 22, 2003 (the "Confirmation Order"). *See In re PG&E*, 304 B.R. at 419. Pursuant to the confirmed Settlement Plan, PG&E entered into approximately $2.9 billion in new and widely syndicated credit facilities, closed the public offering of approximately $6.7 billion in bonds, and made payments to creditors in the aggregate amount of over $8 billion.[8] The Settlement Plan subsequently became effective on April 12, 2004.[9] As of the effective date, PG&E emerged from bankruptcy. It is now operating normally, as a single vertically integrated public utility, outside of bankruptcy.

7. The two Commissioners of the Commission who had voted against the Settlement Plan (the "Dissenting

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[7] *In re PG&E*, Dec. 03-12-035, 230 P.U.R. 4th 101, 142-43, 2003 WL 23104229 (Cal. Pub. Util. Comm'n 2003), *petitions for writ of review filed sub nom. Aglet Consumer Alliance* v. *Pub. Util. Comm'n*, No. A106157 (Cal. Ct. App. filed Apr. 15, 2004), *and City & County of San Francisco* v. *Pub. Util. Comm'n*, No. A106158 (Cal. Ct. App. filed Apr. 15, 2004).

[8] *See* PG&E and PG&E Corp., Form 8-K (filed Apr. 12, 2004); PG&E and PG&E Corp., Form 8-K (filed Mar. 9, 2004).

[9] *See* Notice of Occurrence of Effective Date dated July 31, 2003, Docket Entry No. 15110, *In re PG&E*, No. 01-30923 DM (Bankr. N.D. Cal.).

Commissioners") appealed from the Confirmation Order to the district court. The district court dismissed the appeal for lack of appellate standing, and the Dissenting Commissioners brought an appeal, which remains pending, from that ruling to the Ninth Circuit. *Lynch* v. *Cal. Pub. Util. Comm'n*, 311 B.R. 798, 810 (N.D. Cal. 2004), *appeal docketed*, No. 04-16493 (9th Cir. July 29, 2004). The City of Palo Alto also filed a notice of appeal from the Confirmation Order to the district court. *City of Palo Alto* v. *PG&E*, No. 3:04-cv-00727-VRW (N.D. Cal. notice of appeal docketed Feb. 23, 2004). So far as the district court's docket sheet reveals, Palo Alto has taken no further steps to prosecute its appeal.

REASONS FOR DENYING THE PETITION

I.

THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED

A. The Dispute Allegedly Underlying the Petition Is Likely to Become Indisputably Moot During the Pendency of This Court's Review

Petitioners ask this Court to adjudicate a controversy concerning PG&E's Proposed Preemption Plan, which has been effectively superseded by the confirmed and implemented Settlement Plan. The petition thus does not present a real and substantial controversy. Petitioners contend that the petition is not moot because two federal appeals from the Confirmation Order are pending. *See* Pet. 8 n.2. Petitioners' theory is that *if* one of those appeals is successful; and *if* the Confirmation Order is overturned on appeal as a result; and *if* PG&E can somehow unscramble the eggs by reversing implementation of the Settlement Plan; and *if* PG&E then reverts to a preemption-

based plan, the currently moribund issue as to which petitioners seek certiorari might conceivably be revived.

Petitioners have also said that none of this is likely to happen. "Petitioners fully expect that both appeals [from the Confirmation Order] will be resolved in their favor and that the confirmation order will be affirmed." Pet. 8 n.2. The district court has ruled that appellants in one appeal lack standing; a further appeal is pending before the Ninth Circuit. *See supra* p. 11. The Dissenting Commissioners' terms of office expire at the end of 2004, and if they are not reappointed their appeal will be moot at that time. The second appeal, brought by Palo Alto, has been inactive since February 2004. It is not even clear to respondents that Palo Alto actually intends to prosecute the appeal. The Commission, which is an appellee in that proceeding, will consider moving to dismiss that appeal as moot if PG&E does not do so and if Palo Alto does not abandon the appeal.

Petitioners have further informed this Court that "petitioners believe that both appeals [from the Confirmation Order] will be determined to be moot if not otherwise resolved or disposed of on other grounds."[10] Petitioners are referring to a bankruptcy doctrine under which an appeal from a confirmation order is "equitably moot" if (as here) the confirmation order was not stayed,[11] and if the appellate court would be "unable to afford effective relief" because of events subsequent to confirmation, such as substantial implementation of the

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[10] Petitioners' Application to Extend Time to File Petition for a Writ of Certiorari, docketed May 14, 2003, at 5.

[11] The bankruptcy court and the district court denied a stay of the Confirmation Order. *Lynch* v. *Cal. Pub. Util. Comm'n*, No. C-04-0580 VRW, 2004 WL 793530, at *4 (N.D. Cal. Apr. 9, 2004). No further stay application was made.

confirmed plan. *See S.S. Retail Stores Corp.* v. *Ekstrom (In re S.S. Retail Stores Corp.)*, 216 F.3d 882, 884-85 (9th Cir. 2000). Petitioners thus quite plausibly contend that implementation of the Settlement Plan (which included several multi-billion dollar transactions, *see supra* p.10) could not now be reversed, more than five months after the effective date; and that consequently reversal of the Confirmation Order could not occur. If petitioners are correct, then the past dispute between petitioners and respondents over the Proposed Preemption Plan cannot be revived.

The petition will be indisputably moot if PG&E prevails on both appeals from the Confirmation Order. *See* Pet. 8 n.2. That could readily occur during this Court's review of the Ninth Circuit's decision below. This Court should not waste its resources by commencing review of a case that it would probably be unable to decide on the merits, and that at most is currently of merely contingent significance to the parties.

There is yet another way that this case could readily become indisputably moot during the pendency of this Court's review. Under PG&E's settlement agreement with the Commission, PG&E "shall withdraw" the Proposed Preemption Plan following the later of the effective date for the Settlement Plan, which has already occurred, and "the date on which the Commission approval of this Agreement is no longer subject to appeal . . . ." *In re PG&E*, 230 P.U.R. 4th at 160, 2003 WL 23104229, at App. C, ¶ 9. The quoted phrase refers to review in the California state courts of the Commission's decision, which is ongoing and could conclude during the pendency of this Court's review. *See supra* note 7. Once that review in the California courts is final, PG&E will be required to formally withdraw the Proposed Preemption Plan, and the controversy presented by the Petition will therefore be moot, even if federal appeals from the Confirmation Order remain pending.

B. Certiorari Should Be Denied Because of the Substantial Argument That the Case Is Already Moot

The passage of time and PG&E's implementation of the Settlement Plan have completely transformed PG&E's financial condition since December 2001, when it submitted the Proposed Preemption Plan. Consequently, even if PG&E were to attempt in the future to frame a preemption-based plan, that plan could not be the Proposed Preemption Plan, as described in the proposed disclosure statement that the bankruptcy court disapproved. Practically speaking, such a future plan would necessarily be a new plan, accompanied by a new disclosure statement, that would attempt to restructure PG&E's obligations to its new creditors under its new credit facilities and new publicly held bonds, and that would thus describe radically changed facts and present potentially new legal disputes. (In addition, petitioners do not represent that "in the unlikely event that either challenge to the confirmed plan should succeed" (Pet. 8 n.2), PG&E would attempt to proceed based on a proposed plan invoking express preemption under section 1123(a).) The dispute described in the petition therefore appears to be moot, and any hypothetical future controversy over the supposed possibility of a new preemption-based plan is not ripe. *See Renne* v. *Geary*, 501 U.S. 312 (1991); *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403 (1972).

II.

THE NINTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY HOLDING OF ANY COURT OF APPEALS

The decision below does not conflict with *Universal Cooperatives, Inc.* v. *FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). In *FCX*, a debtor owed a money debt to a creditor that was secured

by non-cash collateral. Under the confirmed plan approved by the Fourth Circuit's ruling, the secured creditor was required to accept the collateral in satisfaction of the debt, where (i) the value of the collateral was equal to the amount of the debt, but where (ii) the secured creditor had a *contractual* right, which the Fourth Circuit held unenforceable on the facts, to refuse to accept the collateral and to demand payment in cash.[12] *FCX* thus simply allowed nonenforcement of a secured creditor's contractual right, where the secured creditor received full value for its claim. *FCX* did *not* permit a debtor to preempt regulatory law.

Section 1123(a)(5)(D) of the Bankruptcy Code allows a plan to include a provision for the "distribution of property of the estate among those having an interest in such property." Under section 1129(b)(2)(A)(iii) of the Code, a plan may be "crammed down" over the objections of a secured creditor if, among other requirements, the secured creditor receives the "indubitable value of [its] claims." The Fourth Circuit held that the collateral the *FCX* debtor proposed to convey to the secured creditor was "property of the estate" in which the secured creditor had an interest for purposes of section 1123(a)(5)(D), and that the conveyance of collateral gave the secured creditor "indubitable value" for purposes of section 1129(b)(2)(A)(iii). 835 F.2d at 1153, 1157-59.

Under section 1141 and related provisions in the Code, a confirmed chapter 11 plan may render certain pre-bankruptcy contractual or economic rights of a creditor against a debtor

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[12] More specifically, the secured creditor claimed that its by-laws entitled it to refuse to accept the collateral. The Fourth Circuit "generally agree[d]" that the by-laws constituted a contract between the secured creditor and the debtor. 835 F.2d at 1154 n.5.

(like the pre-bankruptcy right of the secured creditor in *FCX* to refuse to accept collateral) unenforceable. That power, however, does not derive from the "notwithstanding" clause, which was added to section 1123(a) in 1984 as a technical amendment. Pet. App. 13a. Section 1123(a), as originally enacted in the Bankruptcy Code of 1978, contained no such clause, *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1123, 92 Stat. 2549, 2631-33, and neither did the predecessor provisions in the Bankruptcy Act, *see* Pet. App. 9a-13a. Reorganization plans were able to modify the economic rights of creditors against a debtor before 1984.

The lower federal courts have analogized a confirmed chapter 11 plan to a consent decree or a contract.[13] A plan is adopted through creditor voting by classes or cramdown pursuant to sections 1126 and 1129, and after confirmation is binding under section 1141(a) on "the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor."[14] Section 1141 also specifies the nature

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[13] *See, e.g.*, *First Nat'l Bank* v. *Allen*, 118 F.3d 1289, 1294 (8th Cir. 1997) ("[A] confirmed plan of reorganization acts like a contract that is binding on all parties, debtor and creditors alike."); *Hillis Motors, Inc.* v. *Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.").

[14] *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 530 n.10 (1984) ("[A] plan of reorganization is binding upon all creditors once the plan is confirmed . . . .") (citing 11 U.S.C. § 1141(d)(1)(A)(i)); *see also Stoll* v. *Gottlieb*, 305 U.S. 165, 169 (1938); *In re Equitable Office Bldg. Corp.*, 72 S. Ct. 1086, 1088 (1946) (Reed, J., in chambers); Pet. 13 ("'[T]he very purpose of bankruptcy is to modify the rights of *debtors and*

of the debts from which the debtor is discharged as a result of confirmation. Section 1141 does not describe federal, state, or local governments as bound by the plan, and it does not refer to the discharge of a debtor's obligations under regulatory law.

The result in *FCX*, which approved modification of a creditor's contractual rights, is thus compatible with traditional bankruptcy principles. At most, language in which the *FCX* court described one of its reasons for that result—*i.e.*, its inappropriate reliance on the "notwithstanding" clause of section 1123(a)—can be read, out of context, to be in tension with the Ninth Circuit's decision. *FCX* provides no reason to believe, however, that the *FCX* court would have extended its interpretation of the "notwithstanding" clause from nonenforcement of contractual rights to the utterly different context of preemption of regulatory law. The *Collier* treatise, far from supporting petitioners, underscores this distinction.[15]

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creditors . . . .'") (quoting 130 CONG. REC. H1110 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier)) (emphasis added).

[15] Petitioners principally cite passages from *Collier* that pertain to nonenforcement of contract rights. Pet. 11 n.4. *Collier* squarely asserts, however, that a chapter 11 plan may *not* override state regulatory laws unrelated to financial condition:

> If the terms of a plan call for a party to take an act in violation of an applicable law or regulatory requirement not relating to a debtor's financial condition, a court should not issue an order enabling the debtor to avoid such law or regulatory requirement. For example, if the plan called for the transfer of a broadcast license or a license to sell alcoholic beverages, an order implementing confirmation should not allow the debtor to evade the

In other words, there is every reason to believe that the *FCX* court, if faced with the facts of this case, would have reached exactly the same result as the Ninth Circuit.[16]

Petitioners' other conflict claims are insubstantial. *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997), merely cited the "notwithstanding" clause of section 1123(a) in passing *dicta* as one of several examples of express preemption in the Bankruptcy Code. The citation says nothing about the scope of express preemption under the clause. *Wade* v. *Bradford*, 39 F.3d 1126 (10th Cir. 1994), indicated that a reorganization plan may modify "a *creditor's* state law *property* rights." *Id.* at 1130 (emphasis added). As *Wade* simply allowed nonenforcement of a creditor's mortgage-based rights, and correctly did not attribute that nonenforcement to the "notwithstanding" clause of section 1123(a), it is irrelevant here.

Alleged conflicts with decisions of district courts or bankruptcy courts do not warrant certiorari. *See, e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, of the four such decisions cited by petitioners, one was wrongly decided and is distinguishable on

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necessary regulatory process for obtaining such a transfer.

8 COLLIER ON BANKRUPTCY ¶ 1142.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004).

[16] As the bankruptcy court below commented, "[t]he court in *FCX* was not faced with anything similar to [the] relief sought by [PG&E] in this case, and did not discuss the ramifications of such a reading." Pet. App. 97a.

multiple grounds,[17] and the others do not support petitioners at all.[18] Respondents' position, on the other hand, is supported by

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[17] First, *Pub. Serv. Co. of N.H. v. New Hampshire (In re Pub. Serv. Co. of N.H.)*, 108 B.R. 854 (Bankr. D.N.H. 1989), *vacated as moot by reason of settlement*, No. 90-CV-6 (D.N.H. June 28, 1991) ("*PSNH*"), relied on a blend of implied and express preemption analysis (*see id.* at 887-92; *see also* Pet. App. 90a n.18), while this case is limited to express preemption. Second, *PSNH* allowed preemption only of state laws providing for discretionary review of reorganization transactions by a state agency, *see* 108 B.R. at 860, 887; the opinion denied that the case involved whether plans may "preempt regulatory jurisdiction generally," *id.* at 861. *PSNH* did not involve preemption of statutory prohibitions on such transactions like § 377 of the California Public Utilities Code. Third, *PSNH* characterized (in respondents' view, erroneously) the state laws there identified for preemption as economic. *See id.* at 870, 890; *see also* Pet. App. 91a n.20, 93a.

[18] *See First Union Nat'l Bank* v. *Gibbons (In re Princeton-N.Y. Investors, Inc.)*, 219 B.R. 55, 63 n.8 (D.N.J. 1988) (not involving any dispute concerning the "notwithstanding" clause of § 1123(a), and merely quoting the passage from *Integrated Solutions* discussed above in text); *In re Clarksville Hospitality Corp.*, No. 93-17668-CJK, 1996 Bankr. LEXIS 340 (Bankr. D. Mass. Apr. 4, 1996) (finding state statute respecting interest owed on delinquent tax debts to be inapplicable, but not attributing that result to the "notwithstanding" clause of § 1123(a)); *In re Kizzac Mgmt. Corp.*, 44 B.R. 496 (Bankr. S.D.N.Y 1984) (authorizing modification of creditor's contractual rights in case governed by the Bankruptcy Code *prior* to the 1984 enactment of the "notwithstanding" clause at issue in this case, *see* 44 B.R. at 497 n.1).

lower court decisions.[19] Respondents are aware of no case, and petitioners have cited none, in which a court actually preempted state regulatory law under the "notwithstanding" clause of section 1123(a).

III.

THE NINTH CIRCUIT REACHED THE CORRECT RESULT

A. This Court's Decision in *Holywell Corp.* v. *Smith* Supports Respondents' Position

In *Holywell Corp.* v. *Smith*, 503 U.S. 47 (1992) (discussed at Pet. 12), this Court held that a chapter 11 trustee was required to file a tax return showing income attributable to an asset sale pursuant to a liquidation plan. Tax laws are "nonbankruptcy" laws that are "otherwise applicable" to plan implementation. On petitioners' view, the "notwithstanding" clause of section 1123(a) would therefore displace all such tax laws.

Holywell (which does not refer to the "notwithstanding" clause) described section 1123(a)(5)(B) as authorizing a plan to transfer a debtor's property. *See id.* at 55. That section indicates that such transfers are generically eligible for inclusion in a plan. *Holywell* did not state or imply, however, that a plan may authorize an *illegal* transfer of property, such as (to choose among a multitude of examples) transfers of environmentally hazardous substances in violation of federal or state environmental laws, of a business in violation of federal or

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[19] *E.g.*, *In re Union Golf of Fla., Inc.*, 242 B.R. 51, 59 (Bankr. M.D. Fla. 1998) (plan may not override local zoning laws); *In re Wabash Valley Power Ass'n, Inc.*, No. 85-2238-RWV-11, 1991 WL 11004220, at *73-75 (Bankr. S.D. Ind. Aug. 7, 1991) (plan may not preempt state regulatory laws prohibiting plan transactions).

state antitrust laws, of watershed lands owned by a utility without regulatory approvals, of a nuclear power plant without NRC approval, or of real property in violation of state or local zoning laws. There is a wide difference between reading section 1123(a)(5)(B) to indicate that a trustee may engage in a particular category of lawful transactions pursuant to a confirmed plan, as *Holywell* did, and in reading that section to authorize illegal and even criminal transactions, as petitioners do.

B. The Decision Below Does Not Conflict with Other Holdings by the Courts of Appeals or this Court Interpreting Different "Notwithstanding" Clauses in Different Statutes

According to petitioners, this Court should grant certiorari to disapprove an alleged "line" of Ninth Circuit decisions that supposedly fail to give a literal reading to different "notwithstanding" clauses in widely different statutes. Pet. 14-18. This argument misunderstands the precedents on which the argument purports to rest.

The syntactically complex "notwithstanding" clause of section 1123(a) is hardly self-defining. *Cf. Shomberg* v. *United States*, 348 U.S. 540, 545 (1955). Section 1123(a) begins with the phrase "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall—," which modifies seven immediately following subsections, including subsection 5. Subsection 5 begins with the phrase "provide adequate means for the plan's implementation such as—," followed by a non-exclusive list in subsections (A) through (J) of ten categories of potentially permissible plan provisions.

Section 1123(a), which is titled "Contents Of Plan," commands the plan proponent to set forth, among other things, a statement of "adequate means" as a required element of every plan. Creditors and others scrutinizing the plan are thereby

enabled to assess for themselves whether the "means" specified will in fact be "adequate" to accomplish the purposes of the plan. The non-exclusive list of categories of plan provisions in subsections 1123(a)(5)(A) through (J) indicates that the specified categories are generically appropriate for a plan. Some such categories, such as modification of a lien under section 1123(a)(5)(E), refer to transactions that, if included in a confirmed plan, may override a creditor's contractual or economic rights under section 1141(a) or other Code provisions. *See supra* pp. 15-17. Tellingly, however, the specified categories are all permissible as a general matter under regulatory law.

For section 1123(a)(5), the phrase immediately following the "notwithstanding" clause mandates inclusion of a description of "adequate means" in a chapter 11 plan. Based in part on that text, the bankruptcy court below identified the domain of conflicting laws expressly preempted by the "notwithstanding" clause of section 1123(a) as laws interfering with the statutory prescription that "this section [1123] (and no other law) governs what is to be placed into a plan of reorganization." Pet. App 87a. The Ninth Circuit, adopting a similar approach, held that

> the addition of the "notwithstanding" clause to § 1123(a) made clear that the rules governing what must be in a confirmable plan are contained in § 1123(a) and not in otherwise applicable nonbankruptcy laws. That is, a plan proposed in conformity with § 1123(a) could be confirmed, and a confirmed plan would then have the preemptive effect precisely specified in § 1142(a).

Pet. App. 27a.

The Ninth Circuit's decision did not cite any of the other Ninth Circuit cases that, according to petitioners, supposedly

form part of the same "line." On examination, those cases simply interpret different "notwithstanding" clauses in widely varying statutes using traditional tools. For example, *Oregon Natural Resources Council* v. *Thomas*, 92 F.3d 792, 797 (9th Cir. 1996), rejected "the broadest possible interpretation" of a "notwithstanding" clause so as to avoid rendering nugatory another subsection of the same enactment. Decisions by other courts of appeals have also interpreted various statutory "notwithstanding" clauses by looking to similar evidence.[20]

This case focuses on properly identifying the domain of laws that are preempted by the particular "notwithstanding" clause of section 1123(a)—not on the abstract meaning or force of "notwithstanding" clauses. *Patterson* v. *Shumate*, 504 U.S. 753 (1992), *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), and *Long Island Rail Road* v. *Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1 (1978), involved quite different statutes (or, in *Cisneros*, a quite different contract) and issues, and thus do not significantly illuminate this case.

C. The Decision Below Does Not Conflict with Cases Cited by Petitioners Involving a Canon of Construction That Is Inapplicable Here

According to petitioners, the decision below conflicts with *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001), and other cases invoking the canon of construction that when Congress uses particular language in one section of a statute, but omits that language elsewhere, Congress generally intends a difference in meaning. Pet. 18-20. In *Lorillard*, the Court was

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[20] *E.g.*, *Cliff* v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1124-25 (11th Cir. 2004); *Conoco, Inc.* v. *Skinner*, 970 F.2d 1206, 1223-24 (3d Cir. 1992); *United States* v. *Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980).

considering the only two subsections of a statutory section that was enacted following intense administrative, legislative, and public attention. *See* 533 U.S. at 541-46; *see also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 519 (1992). In the decision below, by contrast, the Ninth Circuit interpreted a textually problematic technical amendment to the Bankruptcy Code. *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), specifically rejected application of the canon on which petitioners rely to support a broad reading of an express preemption provision, because there, as here, the statutory text at issue did "not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* at 434 (citation omitted).

Furthermore, petitioners' interpretation of section 1123(a) creates a more severe anomaly involving section 1142(a). Petitioners say the "notwithstanding" clause of section 1123(a) preempts all nonbankruptcy law applicable to plan implementation. If that were so, then the more limited preemption in section 1142(a) of any "nonbankruptcy law, rule, or regulation relating to financial condition" would be superfluous. In the courts below, petitioners were also obliged to embrace a number of non-textual exceptions to their own interpretation of section 1123(a) in an effort to avoid obviously unacceptable consequences of that interpretation. They asserted, for example, that section 1123(a) provides for only discretionary displacement of federal law but mandatory express preemption of state law, despite the plain textual implication of parity, and despite applicable presumptions that make state law more resistant than federal law to displacement. They also argued that the "notwithstanding" clause does not apply to tax laws; and that it does not authorize preemption of a debtor's post-bankruptcy legal obligations (*see* Pet. 3, 6), although it allegedly does authorize supposedly temporary preemption with permanent results, such as the permanent

structural changes to PG&E's organization and regulatory responsibilities sought in the Proposed Preemption Plan.

D. The Ninth Circuit Properly Construed Section 1123(a) in Light of Applicable Presumptions Against Preemption

In *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), this Court held that a "presumption against the pre-emption of state police power regulations" is properly applied "to support a narrow interpretation" of an express preemption statute. *Id.* at 485 (citing *Cipollone*, 505 U.S. at 518, 523); *see also Ours Garage*, 536 U.S. at 432-40. The decision below properly applied this presumption. Pet. App. 19a.

New York v. *FERC*, 535 U.S. 1 (2002), on which petitioners rely, is inapposite. There, the Court did not apply the presumption to a federal statute that "unambiguously" expanded the substantive jurisdiction of the Federal Energy Regulatory Commission, *but that did not by its terms preempt any state legislation*. *Id.* at 17-20. This case, which required the Ninth Circuit to determine the "domain" of preempted state statutes under an express preemption provision, is a paradigmatic example for application of the presumption. *See Medtronic*, 518 U.S. at 484; *Cipollone*, 505 U.S. at 517. In *Engine Manufacturers Ass'n* v. *South Carolina Air Quality Management District*, 124 S. Ct. 1756 (2004), the Court observed that application of the presumption "demonstrably makes no difference to resolution" of the questions presented. *Id.* at 1763. The Court did not disturb the rule of *Medtronic* and *Cipollone*.

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), and *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), squarely support application of a robust further presumption against preemption

of regulatory law by the Bankruptcy Code. The regulation of public utilities and the environment are areas of traditional state concern. *See PG&E* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 442 (1960). Furthermore, federal energy legislation preserves to the states the authority to determine whether a vertically integrated single-state utility should disaggregate.[21] Petitioners therefore seek to exploit the Bankruptcy Code to alter the Congressionally mandated balance of federal and state authority in this area. And in any event, petitioners seek an interpretation of section 1123(a) that would indiscriminately oust *all* nonbankruptcy law, in *all* areas, for *all* debtors. As whether the presumption applies must be judged against the full range of state and local laws that petitioners' interpretation would preempt, that interpretation calls for the strongest possible presumptions.

Because the purpose of the presumptions is to protect state authority, particularly in areas of traditional state concern, their applicability is judged by looking to the subject matter of the allegedly preempted state statute, not, as petitioners suggest, the allegedly preemptive federal statute. *E.g.*, *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (describing *Medtronic* as "involving medical negligence, a subject historically regulated by the States," and thus looking to subject matter of allegedly preempted state law). In *Locke*, the subject matter of the *state* statute was interstate maritime commerce, which is why no presumption against preemption applied. *See id.* at 99, 108-09.

On an extraordinarily slight alleged statutory warrant, petitioners' interpretation of section 1123(a) would confer on plan proponents an unprecedented ability to displace all

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[21] *See* 16 U.S.C. § 824(b)(1); Cudahy, *supra* note 2, at 349-50 & n.69.

nonbankruptcy federal,[22] state, and local regulatory law. It would be no answer to suggest that bankruptcy courts have some amorphous general discretion to reject particularly exorbitant attempts at preemption. First, on petitioners' theory, the bankruptcy court, like the affected governmental authorities, would not necessarily even know of all the preempted laws. Second, the "notwithstanding" clause by its terms does not empower bankruptcy courts to carve out *ad hoc* exceptions. Thus, petitioners argued below that the "notwithstanding" clause calls for automatic and self-executing displacement of "any" nonbankruptcy law that would otherwise regulate implementation of a plan, whatever views a bankruptcy court might have about the wisdom of preempting particular laws on particular facts. (In contrast, under the doctrine of implied preemption, which is not at issue here, courts may make nuanced judgments concerning whether a particular state law impermissibly "'interfere[s] with the bankruptcy adjudication.'" Pet. App. 28a (quoting *Midlantic*, 474 U.S. at 507).) The utter improbability that Congress would confer so "revolutionary," Pet. App. 87a, and unconfined a power on plan proponents, through so unlikely and inappropriate a vehicle, must count heavily against petitioners' theory. Third, it is highly implausible to think that Congress, through a technical amendment, empowered every bankruptcy judge in the country to make standardless determinations as to which regulatory laws

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[22] Petitioners argued below that section 1123(a) confers only a limited power to displace federal nonbankruptcy law, because that section should be harmonized with other federal laws. But harmonization applies only when neither of the allegedly conflicting federal statutes reflects a "clear intention" as to which should prevail, *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974), and on petitioners' view the "notwithstanding" clause would necessarily reflect such an intention.

are sufficiently important to be enforced in bankruptcy proceedings.

Other, narrower preemptive provisions of the Bankruptcy Code would be superfluous if section 1123(a) had the reach that petitioners claim. Section 1124(2) permits a debtor to cure certain defaults "notwithstanding any contractual provision or *applicable law* that entitles the holder of [a claim or interest] to demand accelerated payment of such claim or interest after the occurrence of a default." (Emphasis added.) Section 1145(a)(1) exempts certain "offer[s] or sale[s] under a plan of a security of the debtor" from securities laws, including certain "State or local law[s]," and section 1145(d) exempts certain "notes issued under a plan" from the Trust Indenture Act. Section 1146(c) exempts certain transactions "under a plan" from any stamp or similar tax—taxes that are typically imposed under state law. The limited prohibition in section 525 on a regulator's ability to cancel certain licenses, which this Court considered in *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), would be superfluous if a debtor could override nonbankruptcy licensing restrictions (as PG&E tried to do here) by providing for mandatory license transfers, notwithstanding contrary regulatory law, in a chapter 11 plan.

Congress, mindful of the need for parity under regulatory law between debtors and nondebtors within a state, has structured the Bankruptcy Code and related statutes to preserve state regulatory authority. *See* 11 U.S.C. § 362(b)(4) (automatic stay inapplicable to exercise of police or regulatory powers); *id.* § 1129(a)(3) (plan may not be proposed "by any means forbidden by law"); 28 U.S.C. § 959(b) (bankruptcy trustee and debtor in possession "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated"); *id.*

§ 1452(a) (no removal to federal court of any bankruptcy-related "civil action by a government unit to enforce such governmental unit's police or regulatory power"); *see also* 11 U.S.C. § 363(b)(2)(B) (shortening waiting period under Hart-Scott-Rodino Act for certain sales of property in bankruptcy, and thereby demonstrating Congress's background assumption that antitrust laws apply to bankruptcy proceedings); *Butner* v. *United States*, 440 U.S. 48, 54-55 & n.9 (1979); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 172-73 (1946) (Frankfurter, J., concurring) ("The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court.").

Finally, petitioners' theory would create enormous tension between a debtor's duty to obey state law before confirmation of a plan, *see* 28 U.S.C. § 959(b), and the debtor's supposed freedom to ignore nonbankruptcy regulatory law applicable to implementation of a confirmed plan. Before confirmation, for example, a debtor "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic*, 474 U.S. at 507. On petitioners' theory, section 1123(a) would unconditionally invalidate environmental law applicable to abandonment of property under a plan. That theory would therefore render the holding of this Court's *Midlantic* decision completely ineffective.

CONCLUSION

The petition for a writ of certiorari should be denied.

September 27, 2004

Respectfully submitted,

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IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC CO. AND PG&E CORP.,
Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

I. The Ruling Below Is Wrong On The Merits And Has Manifest Importance To The Administration Of The Bankruptcy System.

The petition for certiorari demonstrated that the Ninth Circuit's construction of Section 1123(a)(5) is contrary to the statute's plain language and the decisions of this Court and other courts of appeals. No other court agrees with the Ninth Circuit's counter-textual conclusion that Congress's directive that a plan of reorganization will be effective "notwithstanding *any* otherwise applicable nonbankruptcy law" limits the preemption of state law merely to laws "*relating to financial condition*" (emphasis added), *i.e.*, the scope of Section 1142(a) of the Bankruptcy Code. It is therefore not surprising that respondents almost entirely fail to defend the Ninth Circuit's ruling and instead propose a new reading of Section 1123(a)(5) that only confirms that certiorari is warranted.

1. According to respondents, "[t]he syntactically complex 'notwithstanding' clause of section 1123(a) is hardly self-defining." BIO 21. In fact, there is nothing "complex" or otherwise ambiguous about the statute's provision that a plan of reorganization is effective "notwithstanding *any* otherwise applicable nonbankruptcy law" (emphasis added). There is no reasonable way to read "any" to mean (as the Ninth Circuit held) "relating to financial condition" or (as respondents propose) "non-regulatory."

The Ninth Circuit's refusal to give Sections 1123(a)(5) and 1142(a) the distinct meanings that their texts require is, moreover, contrary to common sense and this Court's precedent. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001). The case cited by respondents – *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002) – is not to the contrary. *Ours Garage* held that a reference to a "State" in an exception to a preemption provision also encompassed municipalities when the

preemption provision itself referred to a "State" and its "political subdivision." *Id.* at 428. The Court reasoned that the so-called *Russello* presumption – that Congress's use of different words in two provisions signifies that those provisions have a different meaning – was overcome because the exception differed from the general preemption provision in other ways: "The *Russello* presumption * * * grows weaker with each difference in the formulation of the provisions under inspection." *Id.* at 435-36.

Here, by contrast, the Ninth Circuit erred in according identical preemptive scope to Sections 1123(a)(5) and 1142(a). The two provisions have different texts and address different issues. Section 1123(a)(5) addresses the implementing transactions of a plan of reorganization, while Section 1142(a) is concerned with post-reorganization events. See Pet. 20. Contra BIO 24 (asserting that petitioners' construction would render Section 1142(a) superfluous). Section 1142(a) thus "deal[s] not with substantive provisions of a plan but rather with the effectuation of a confirmed plan" and, in particular, was intended to make clear that, after reorganization, the reorganized debtor is not authorized "to *carry out* the plan in violation of net capital and other financial condition rules." *In re Public Service Co. of N.H.*, 108 B.R. 854, 886-87 (Bankr. D.N.H. 1989). That is precisely the distinction drawn by the excerpt from the Collier bankruptcy treatise on which respondents mistakenly rely. Section 1123(a)(5) does not provide authority to preempt state law restrictions on *post-reorganization* operations such as through "the transfer of a broadcast license or a license to sell alcoholic beverages." 8 COLLIER ON BANKRUPTCY ¶ 1142.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004), *quoted at* BIO 17 n.15. Instead, under the statute, "[t]he alternatives set forth in section 1123(a)(5) are self-executing – that is, the plan may propose such actions notwithstanding nonbankruptcy law or agreement." 7

COLLIER ON BANKRUPTCY ¶ 1123.01[5] (15th ed. 1996 & Supp. 2004).[1]

Respondents also err in contending that petitioners' reading would produce absurd results such as "transfers of environmentally hazardous substances." BIO 20-21. First, as discussed *supra*, Section 1123(a)(5) does not preempt state and local law on an ongoing basis, post-reorganization. Accordingly, unless the recipient of toxic waste were otherwise authorized by state and federal law to handle such materials on an ongoing basis, Section 1123(a)(5) would not permit the proposed transfer. Moreover, the issue of reconciling Section 1123(a)(5) with other federal laws (such as those regarding toxic waste) is a matter of harmonization, not preemption.

Although respondents suggest that petitioners' position would, supposedly, lead to the preemption of federal law, they ultimately concede in a footnote (BIO 27 n.22) that the question is one of harmonizing competing provisions of federal law. Contrary to respondents' suggestion (*id.* 28), petitioners have long made clear that the more specific provisions of federal licensing law might well be deemed to control over provisions of bankruptcy law. See, *e.g.*, Petrs. C.A. Br. 69 ("Faced with two controlling federal directives—such as one stating that a reorganization will be implemented 'notwithstanding' other law, and another specifically forbidding a particular transaction such as the export of a product or a type of merger—"[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified

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[1] The statutes that respondents cite to illustrate that Congress "structured the Bankruptcy Code and related statutes to preserve state regulatory authority" (BIO 28-29) prove petitioners' point. They demonstrate that Congress knows how to reserve power to the states when it wishes to do so; none would have been necessary if there were an overarching bankruptcy principle that a debtor must comply with state regulatory law.

by a general one * * *." (quoting *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) (citation omitted))).

2. Nor can the decision below be rescued by resort to the "presumption against preemption." To the contrary, as the petition established, the Ninth Circuit's reliance on that presumption conflicts with this Court's precedents. See Pet. 20-23. Respondents have no answer to the fact that bankruptcy law and energy law are the traditional domains of federal, not state, regulation. See *id.* 22-23. Nor can any "presumption" overcome Section 1123(a)(5)'s unambiguous application to "any" state law. And, in any event, the proper construction of a preemption provision (the question in this case) is antecedent to and distinct from the question whether a particular state statute is impliedly preempted by a federal statute under the rubric of "conflict" preemption. See *id.* 20-21.

3. The petition furthermore established that the proper construction of Section 1123(a)(5) is vital to the orderly functioning of federal bankruptcy law. See Pet. 12-14. Virtually every reorganization will, of necessity, require that state law – at the very least, state property law – be superseded. Section 1123(a)(5) is, moreover, the sole source of authority for myriad basic bankruptcy tools that are essential elements of any successful reorganization plan. For example, unless state law is superseded, a plan of reorganization could not modify a lien, waive a default, or extend a maturity date, see 11 U.S.C. 1123(a)(5)(E), (G), & (H), without the creditor's consent – notwithstanding the fact that these tools are essential features of successful bankruptcy plans, see 7 COLLIER ON BANKRUPTCY ¶ 1123.01[5], *supra*. This case accordingly has great significance for all manner of ongoing bankruptcy proceedings.

II. The Ninth Circuit's Decision Conflicts With Rulings Of Other Circuits And This Court.

1. The petition demonstrated the square conflict between the Ninth Circuit's construction of Section 1123(a)(5) and decisions of other circuits, including particularly the Fourth Circuit's ruling in *Universal Cooperatives, Inc.* v. *FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (1988), cert. denied, 489 U.S. 1011 (1989). Whereas the Ninth Circuit held that Section 1123(a)(5) merely preempts state law relating to the debtor's financial condition, the Fourth Circuit broadly held that Section 1123(a)(5) is "an empowering statute" that "does not simply provide a means to exercise the debtor's pre-bankruptcy rights," but in fact "enlarges the scope of those rights," 853 F.2d at 1155. Respondents' characterization of *FCX* as merely "approv[ing] modification of a creditor's contractual rights," BIO 17, is incorrect, as this Court recognized in citing *FCX* as a case in which the courts of appeals have construed "notwithstanding" clauses "to supersede other laws," *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Respondents contend that *FCX* is distinguishable because that case, unlike this one, did not involve state "regulatory" law. BIO 15, 17. Respondents urged that argument below, but the court of appeals rejected it, instead limiting the statute's preemptive scope to laws relating to the debtor's financial condition. Indeed, respondents' "regulatory/non-regulatory" distinction does not appear in Section 1123(a)(5) or in *any* decision construing the statute, even the Ninth Circuit's. Respondents' proposed distinction is, moreover, illusory in practice: *all* law that must be overridden by a plan of reorganization is "regulatory" in relevant respects, for it governs the property rights of debtors and creditors.

Respondents also offer an extended explanation of various bankruptcy provisions that could be invoked to make "[t]he result in *FCX*" consistent with the outcome in this case. See BIO 15-17. That is simply incorrect: an essential

element of the Fourth Circuit's reasoning was that the transaction at issue in that case was authorized by Section 1123(a)(5), which overcame the creditors' state-law rights. Because those rights have nothing to do with the "debtor's financial condition," the Ninth Circuit would hold that they are not preempted by the Bankruptcy Code.

Nor can the Ninth Circuit's ruling be rationalized with the conclusion of other circuits and district courts that Section 1123(a)(5) both expressly authorizes the restructuring measures set forth in the statute and preempts contrary state law. See Pet. 10-11 & n.3. For example, respondents would distinguish the facts of the Tenth Circuit's decision in *Wade* v. *Bradford*, 39 F.3d 1126 (1994), as involving the preemption of state property law, BIO 18, while they dismiss the Third Circuit's citation of Section 1123(a)(5) as an example of "the explicit language that Congress uses when it intends to displace state nonbankruptcy law," *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 493 (1997), as mere "dicta" that "says nothing about the scope of express preemption," BIO 18. In so doing, however, respondents ignore two essential points: both the Third and Tenth Circuits, like the Fourth Circuit in *FCX*, regard Section 1123(a)(5) as an "empowering" statute that overrides nonbankruptcy law, and neither agrees with the Ninth Circuit's construction of Section 1123(a)(5) as preempting only state laws "relating to financial condition."

Respondents' construction of Section 1123(a)(5) also cannot be reconciled with this Court's conclusion in *Holywell Corp.* v. *Smith*, 503 U.S. 47, 55 (1992), that the statute "authoriz[es] a plan to transfer 'all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan.'" According to respondents, "*Holywell* did not state or imply, however, that a plan may authorize an *illegal* transfer of property." BIO 20 (emphasis in original). But *all* involuntary transfers of property under a plan of reorganization are "illegal" in the relevant sense: that they are prohibited by state property law

that must be preempted in order for the reorganization to take effect.

The ruling below not only gives rise to a conflict over the meaning of Section 1123(a)(5) but also exacerbates a broader, pre-existing conflict created by a large body of Ninth Circuit precedent over the proper construction of the numerous provisions of federal law instructing that a statute be given effect "notwithstanding any" contrary state law. See Pet. 14-18. Respondents note that the cases cited by the petition involve "widely varying statutes." BIO 23. But that is precisely the point: in all those varying contexts, this Court and circuits other than the Ninth consistently give "nothwithstanding any" preemption provisions their natural, broad reading. This case accordingly has substantial significance for the proper construction of preemption provisions in an array of federal statutes.

III. Certiorari Should Not Be Denied On The Ground That The Petition Is Moot.

The petition explained, and respondents reiterate, that the parties have attempted to settle their dispute by agreeing to an alternative plan of reorganization (hereinafter, "the settlement plan"), although the order confirming that plan is the subject of two separate appeals (one now pending in the Ninth Circuit, the other in the District Court), as well as appeals in the state courts. Petitioners agree with respondents that, if all of those appeals were to be dismissed or denied, review of the petition in this Court would not be necessary, although the Court would have the power to decide the case. *Honig* v. *Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

Petitioners had therefore proposed that respondents take a further extension of time to respond to the petition while the appeals of the settlement plan were resolved, which is the ordinary practice in this Court when a settlement may moot a pending petition. This Court is not so constrained, however, that it must immediately confront whether to grant certiorari on the important question presented despite the prospect that

the case could become moot in the future. Petitioners instead suggest that the Court hold the petition in abeyance pending the disposition of the pending appeals. Alternatively, the Court could invite the Solicitor General to express the views of the United States in the case. As respondents note (BIO 5), in light of the importance of the case, the federal government filed a brief for the United States in the court of appeals, taking a position that was contrary to both petitioners and respondents.

Respondents err, however, in their further contention that the petition is already moot no matter how the appeals are resolved. If any of the pending appeals from the settlement plan succeed, petitioners will continue to pursue the plan of reorganization that is the subject of this petition.[2] The appeal is accordingly not moot, by virtue of those pending appeals. Although respondents are correct (BIO 14) that the plan would have to be modified to account for present economic circumstances (a fact that is true as all complex reorganizations proceed), those changes would not involve the plan's basic restructuring transactions and thus would not in any respect moot the preemption question presented by the petition.[3]

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[2] Respondents suggest that petitioners will be required to withdraw the preemption reorganization plan that is the subject of this petition if state court challenges to the settlement plan are rejected. BIO 13. But, even in such circumstances, petitioners would have the right to resubmit a new preemption plan if the federal appeals were ultimately resolved adversely to petitioners. The meaning of Section 1123(a)(5), which is the question presented by the petition, is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), in light of its widespread implications for the bankruptcy system.

[3] Respondents also note that petitioners might be able to prevail in the pending appeals by persuading the lower courts that the appeals from the settlement plan are themselves "equitably

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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moot." See BIO 12. That is no more than another ground on which petitioners could prevail in those appeals.